163-707

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 114

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE ROSEDALE STREET RAILWAY COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

FILED APRIL 27, 1895.

(15,030.)

THE LAW ASSOCIATION
—OF—
PHILADELPHIA.

(15,030.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1895.

No. 114.

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE ROSEDALE STREET RAILWAY COMPANY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

INDEX.

	Original.	Print.
Caption	*a*	1
Transcript from county court	1	1
Caption	1	1
Plaintiff's first amended original petition	1	1
Original answer of Texas and Pacific Railway Company	6½	4
Suggestion of death of John C. Brown and order thereon	9	5
Order on general demurrer	9	5
Verdict and judgment	10	6
Charge of the court	11	6
Special charge asked by defendant No. 1	13	8
No. 2	15	8
No. 3	16	9
No. 4	17	9
No. 5	17	10
Defendant's motion for new trial	18	10
Order overruling motion for new trial	20	11
Motion for ten days to file statement of facts	21	11
Order on motion to file statement of facts	21	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 20, 1895.

	Original.	Print.
Statement of facts	22	12
Testimony of James Hukill	22	12
Anderson Cavil	29	15
Dave Perkins	32	17
Tom Owens	38	19
W. B. Quigg	40	20
Plat offered in evidence by plaintiff	43	21
Depositions of John C. Brown	48	23
Testimony of J. W. Watson	54	26
B. F. Page	55	26
Plat offered in evidence by defendant	57	27
Order on petition of John C. Brown, receiver, for discharge, introduced by defendant	58	27
Ordinance No. 382 of the city of Fort Worth, introduced by defendant	60	28
Depositions of J. B. Erisman	62	29
Charles T. Elliott	65	31
James M. Goodrich	68	32
George Bowers	70	33
Testimony of J. J. Goodfellow	71	33
M. Scougale	72	34
Anderson Cavil (recalled)	73	34
Dave Perkins (recalled)	73	34
Appeal bond	74	35
Assignment of errors	76	36
Statement of costs	79	37
Certificate of clerk	80	37
Certificate of clerk of court of appeals	81	38
Notes endorsed on transcript	81	38
Judgment of court of appeals	82	38
Certificate of clerk of court of appeals	82	38
Petition for writ of error	83	39
Writ of error (copy)	94	44
Supersedeas bond	97	45
Assignment of errors	99	46
Certificate of clerk of court of appeals	103	48
Original writ of error	105	48
Original citation	107	49
Original assignment of errors	108	50

a In the Court of Appeals of the State of Texas, Galveston, —— Term, 1892.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Appellants,
vs.
THE ROSEDALE STREET RAILWAY COMPANY, Appellees. } No. 3348.

Be it remembered that in the above entitled and numbered cause, lately pending in the court of appeals of the State of Texas, holding its sessions in the county of Galveston, at the January term of said court, the session commencing on the first Monday of January, 1892, and ending on the 26th day of March, 1892—Hon. John P. White, presiding judge, and the Hons. W. L. Davidson and J. M. Hurt presiding—a final judgment was rendered on the 3rd day of March, 1892, upon the said case, and the following proceedings as they appear and are of record in said court, to wit:

1 *Caption.*

THE STATE OF TEXAS, }
County of Tarrant. }

At a term of the county court begun and holden within and for the county of Tarrant, State of Texas, at the court-house thereof, in the city of Fort Worth, on the 5th day of January, A. D. 1891, before the Honorable W. D. Harris, judge of said court, and which said term of court adjourned on the 28th day of February, A. D. 1891, the following proceedings were had upon the trial of the following cause, to wit:

ROSEDALE STREET RAILWAY COMPANY
vs.
JOHN C. BROWN, Receiver, *et al.* } 2730.

Pl'ff's First Amended Original Petition.

Filed October 8, 1889.

In County Court of Tarrant County, Texas.

ROSEDALE STREET R'Y CO.
vs.
JOHN C. BROWN, Receiver, *et al.* } No. 2730.

Now comes the Rosedale Street R'y Co., plaintiff in the above cause, and the death of defendant John C. Brown, receiver, having heretofore, on the — day of September, 1889, been suggested
2 to the court in regular session, and said suggestion having been on that day entered of record, and leave of court being first had and obtained, files this its first amended original petition,

making The Texas & Pacific Railway Company a party defendant herein, as follows, to wit:

To the hon. county court of Tarrant county:

The Rosedale Street Railway Company, a private corporation duly and legally incorporated under the laws of the State of Texas and having its domicile and principal office in Fort Worth, Tarrant county, Texas, hereinafter styled plaintiff, complaining of The Texas & Pacific Railway Company, a railroad corporation duly incorporated by an act of Congress of the United States of America, hereinafter styled defendant, respectfully represents that upon the dates and times hereinafter mentioned defendant was and still is the owner of a certain line of railway situated and lying in the State of Texas and the county of Tarrant, in said State; that during the years 1887 and 1888 the said railway was run and operated by one John C. Brown, who was acting as receiver of said road by appointment from the United States circuit court for the fifth circuit and the eastern district of Louisiana, in the city of New Orleans, in said district.

That on, to wit, May 3rd, 1888, and while said railroad was in the hands of and being run and operated by said receiver, as
3 aforesaid, the plaintiff was lawfully operating a line of street railway on Front street, in the city of Fort Worth, Tarrant county, Texas; that the said Texas & Pacific Railway Company on said last-named date had a spur track of its road situated and built out from its main line and yards in said city to and across Front street aforesaid at the intersection of Rusk street with Front street; that the defendant, The Texas & Pacific R'y Co., had also on said date another spur track of its road built and situated along the south edge of Front street parallel with plaintiff's street railway from Main street to and beyond Rusk street, a distance of over two hundred feet, the said street-railway line and said latter parallel spur track being about five feet apart from Main street to Rusk street aforesaid.

That on, to wit, said 3rd day of May, 1888, the said receiver had control and management of said spur tracks and was running and operating the same as such receiver; that said Front street is one of the public streets and highways of said city; that the said receiver did on said day negligently and carelessly place on said spur track parallel with the line of plaintiff's street railroad ten box cars and negligently and carelessly permitted the same to remain on said spur track on Front street between the line of plaintiff's street r'y and the yards, spurs, and switches of the Texas & Pacific Railway Company, thereby totally obstructing the view from
4 plaintiff's street cars to the spur track of the Texas & Pacific railway crossing said Front street first above mentioned and totally obstructing the view from said street cars to the yards and switches and spur tracks running out from the Texas & Pacific railway and crossing Front street, so that plaintiff's street-car driver could not see defendant's engines and cars from any point between

Main street and Rusk street that were being operated on said first-named spur track.

That on said day the plaintiff was then and there operating one of its street cars on its railway track on said Front street from Main street towards and across Rusk street and across the spur track first above mentioned on its trip to the Union depot in said city; that the said receiver in operating trains on the said first above mentioned spur track by the force of defendant's engine, run and propelled by steam, did then and there carelessly and negligently, and without sounding the whistle or ringing the bell on said engine, and with great speed and force, backed, pushed, and propelled a train of freight cars across Front street aforesaid at its intersection with Rusk street on the spur track as aforesaid and upon and across the plaintiff's street railway track, and while the plaintiff with its street car was crossing defendant's said spur track did negligently and carelessly, and without sounding the whistle or ringing
5 the bell of said engine or otherwise warning the plaintiff, run over, crush, and break and destroy the plaintiff's street car aforesaid without any negligence or fault on the part of plaintiff or its servants or employees, to the damage of plaintiff in the sum of one thousand dollars.

That the said street car so broken and destroyed was then and there of the reasonable value of one thousand dollars.

Plaintiff further alleges that during the time said Texas & Pacific railway was in the hands of said John C. Brown, receiver as aforesaid, and while the same was being operated by him, the sum of, to wit, five and one-half millions dollars of the current receipts of said railroad were used and expended by said receiver, under orders of said United States circuit court, for the betterment of said railroad and in the purchasing of rolling stock, machinery, and material for maintaining and operating said road; that afterwards, on, to wit, the 31st day of October, 1888, said John C. Brown was discharged from said receivership by order of the United States circuit court, the court appointing him as such, and in said order so discharging him the said receiver was directed and commanded to turn over and deliver to defendant, The Texas & Pacific Railway Company, all the property, funds, and assets in his hands as such receiver; that in obedience to said order of court the said
6 receiver did, on, to wit, October 31st, 1888, make delivery unto defendant, Texas & Pacific Railway Company, — the said railway, with all the betterments placed thereon during said receivership, together with all the rolling stock, machinery, and material belonging thereto, and all the rolling stock, machinery, and material purchased and obtained by him for said railroad during his said receivership as aforesaid; all of which was duly received and accepted then and there by the defendant, The Texas & Pacific Railway Company, who was the original owner of said railway before it was placed in the hands of John C. Brown, receiver as aforesaid.

Plaintiff further avers that upon the delivery to said defendant of said railroad, betterments, rolling stock, machinery, and mate-

rial by John C. Brown as aforesaid the said Brown was, by the terms of said order of the United States circuit court aforesaid, discharged from said receivership and said receivership proceeding closed.

That at the time the defendant, The Texas & Pacific Railway Company, received from the said John C. Brown, receiver, the betterments on said road, and the rolling stock, machinery, and material belonging to the road and purchased and acquired by him during said receivership as aforesaid, the said betterments, rolling stock, machinery, and material were reasonably worth, to wit, the
6½ sum of five and one-half millions dollars, and that defendant is and has been ever since said delivery the owner of the same, and has been ever since said time and is now claiming, using, and enjoying the same.

Plaintiff further says that by reason of the premises the defendant, The Texas & Pacific Railway Company, has become liable to pay plaintiff its damages occasioned as aforesaid.

Premises considered, plaintiff prays for citation against said Texas & Pacific Railway Company, and that upon final hearing hereof it have judgment against said defendant for its damages, interest, costs of suit, and for general relief.

HUNTER, STEWART & DUNKLIN,
Attorneys for Plaintiff.

Filed October 8th, 1889.

JNO. P. KING, *Co. Clk.*

Original Answer of Texas & Pacific R'y Co.

Filed December 10th, 1889.

In the County Court of Tarrant County, Texas.

ROSEDALE STREET R'Y CO.
vs.
JOHN C. BROWN, Receiver, *et al.* } No. 2730.

7 Now comes the Texas & Pacific Railway Company, by attorney, in above numbered and entitled cause and demurs to plaintiff's petition, and says that the allegations thereof are insufficient in law.

2. And, further, for special exception defendant says that plaintiff ought not to be allowed to further prosecute this cause, because it appears by the allegations of plaintiff's petition its cause of action against this defendant is barred by the statute of limitations of two years, that time having elapsed since the cause of action accrued prior to the filing of suit against this defendant, and of this it prays the court's judgment.

3. And, further answering, if so required, defendant denies all and singular the allegations in plaintiff's petition contained, and says that it is not guilty of said supposed wrongs, injuries, and trespasses as plaintiff hath by its petition alleged; and of this defendant puts itself upon the country.

4. And for special answer defendant says that plaintiff ought not to be allowed to maintain this action against defendant, because the cause of action upon which plaintiff sues had accrued more than two years next before the filing of suit herein against this defendant; and this defendant is ready to verify.

FINCH & THOMPSON,
Att'ys for Def't Texas & Pacific R'y Co.

8 5. And for further special answer defendant says that plaintiff ought not to have or maintain this action, because it says that by the terms of said order of discharge referred to in plaintiff's petition plaintiff and all other claim-s were directed and required to intervene in said cause in which said order was entered at New Orleans, La., in the U. S. circuit court, and they were allowed until the 1st of February, 1889, to make said intervention and prosecute their claims in said cause; but plaintiff has failed and refused to so intervene in said cause, and by the terms of said order plaintiff's action is barred and cannot now be maintained.

6. And for further special answer defendant says that if said accident occurred as alleged the defendant says that the same was caused and occasioned by the contributory negligence of plaintiff's driver, in charge of said street car, in failing to stop, look, and listen for approaching trains and in failing to observe the approaching train.

And all this defendant is ready to verify.

FINCH & THOMPSON,
Att'ys for Def't Texas & Pacific R'y.

Filed December 10th, 1889.

JNO. P. KING, *Co. Clk.*

9 *Death of Def't John C. Brown Suggested, September* 18*th*, 1889.

ROSEDALE STREET R'Y CO. *vs.* JOHN C. BROWN, Receiver. } No. 2730.

WEDNESDAY, *Sept.* 18*th*, 1889.

Now comes defendant's attorney and suggest- to the court the death of defendant since the last term of this court. Ordered by the court that this cause be continued to make parties defendant.

Order on Def't Tex. & Pac. R'y Co.'s General Demurrer, February 13*th*, 1891.

ROSEDALE STREET R'Y CO. *vs.* JOHN C. BROWN, Receiver. } No. 2730.

FRIDAY, *Feb'y* 13*th*, 1891.

This day came the parties, by their attorneys, and then came on to be heard the defendant The Texas & Pacific Railway Co.'s general

demurrer to the plaintiff's first amended original petition; and, the argument of counsel being heard thereon, because it is the opinion of the court that the law is for the plaintiff, it is therefore
10 ordered that said general demurrer be, and the same is, overruled; to which ruling of the court the defendant excepts.

Judgment, February 13th, 1891.

ROSEDALE STREET R'Y CO. vs. JOHN C BROWN, Receiver. } No. 2730.

FRIDAY, *Feb'y 13th*, 1891.

This day came the parties, by their attorneys, and announced ready for trial. A jury being demanded, there came a jury of good and lawful men, to wit, J. L. Foster and five others, who were duly selected, empanelled, and sworn according to law; and the said jury, after hearing the evidence and argument of counsel and receiving the charge of the court, retired to consider of their verdict, and after mature deliberation returned into open court the following verdict, to wit:

"We, the jury, find for the plaintiff, and assess the damages at three hundred dollars ($300.00), with interest at 8 per cent. from January 1, 1889, to February 13, 1891, fifty dollars and eighty-seven cents ($50.87)—total, $350.87.

J. L. FOSTER, *Foreman*."

It is therefore considered, adjudged, and decreed by the
11 court that the plaintiff, The Rosedale Street Railway Company, do have and recover of and from the defendant The Texas and Pacific Railway Company the sum of three hundred and fifty and $\frac{87}{100}$ dollars, with interest thereon at the rate of eight per cent. per annum, together with all costs in this behalf expended, and that it have its execution. Further ordered that execution issue for the use of the officers of court against each party respectively for all costs by them herein incurred.

Charge of the Court.

Filed February 13th, 1891.

In County Court of Tarrant County, Texas.

ROSEDALE STREET R'Y CO. vs. JOHN C. BROWN, Receiver, &c. } No. 2730.

You are instructed, gentlemen of the jury, that the burden is on the plaintiff to make out its case by a preponderance of the evidence, and unless it has done so it will be your duty to find for the defendant.

You are the exclusive judges of the credibility of the witnesses, of the weight of the evidence, and of the facts proved.

If you believe that the collision between the street car and the train testified about was caused by negligence or carelessness
12 of the parties then operating and controlling the Texas & Pacific Railway Company's tracks, and caused either from their having left box cars standing on Front street so as to obstruct the view of parties passing along Front street, or from the train's being carelessly operated at the time of the collision, and if you further believe that the street-car driver was not negligent nor careless himself at the time, then it will be your duty to find for the plaintiff against the Texas and Pacific Railway Company and assess its damages at such sum as will equal the damage done to the street car, estimating the same at the difference in the value of the car just before and its value just after the accident, together with interest on said difference, at 8 per cent. per annum, from January 1st, 1889, to the present time. Unless you believe that the managers of the railway company's train were guilty of negligence, as alleged by plaintiff, and also further believe that said negligence was the direct and proximate cause of the collision, it will be your duty to find for the defendant. It is the duty of a person to exercise reasonable caution and care when approaching a railroad crossing. If you believe that the collision spoken of resulted from negligence or carelessness on the part of the street-car driver, or if you believe he was guilty of negligence which contributed in a material degree to produce the collision, then you should find for the defendant.

13 Negligence and carelessness as herein used means a want of reasonable caution and care—that is, a want of such caution and care as a reasonably prudent man would exercise under similar circumstances. Reasonable caution and care *is* such caution and care as a reasonably prudent man would exercise under similar circumstances.

It is the duty of parties in charge of a train when approaching a public highway to ring the bell or blow the whistle when at a distance of at least 80 rods from the place where the railroad crosses the highway, and a failure to do so is negligence; but even if a party fails to do so and damage is done at the crossing, still, in order to make the railway company liable for such damages, it must be made to appear by a preponderance of the evidence that such failure was the cause of such injury, or that the railway company was guilty of negligence in some other respect which caused the injury.

W. D. HARRIS, *Co. Judge.*

Filed February 13, 1891.

JNO. P. KING, *Co. Clk.*

Special Charge Asked by Def't, No. 1.

Filed February 13th, 1891.

14 In County Court of Tarrant County, Texas.

ROSEDALE STREET R'Y CO. *vs.* JNO. C. BROWN, Receiver, *et al.* } No. 2730.

Your are further instructed, gentlemen of the jury, that if you believe from the evidence that if the driver of plaintiff's damaged car could by the use of ordinary care have seen the engine or cars which caused the damage in time to avoid the accident, but that he failed to exercise such care as a person of ordinary prudence should have exercised, and that such failure contributed directly to said accident, then you should find for the defendant, even though you should believe that the defendant failed to ring its bell or sound its whistle and was running its cars at an excessive rate of speed.

FINCH & THOMPSON,
Att'ys for Def't T. & P. R'y Co.

Refused because given substantially in main charge.

W. D. HARRIS, *Co. Judge.*

Filed February 13th, 1891.

JNO. P. KING, *Co. Clk.*

15 *Special Charge Asked by Def't, No. 2.*

Filed February 13th, 1891.

In County Court, Tarrant County, Texas.

ROSEDALE STREET R'Y CO. *vs.* JOHN C. BROWN, Receiver, *et al.* } No. 2730.

You are further instructed, gentlemen of the jury, that if you believe from the evidence that the plaintiff's driver in charge of its injured car knew as he approached the place of said accident that his view was obstructed and the dangerous character of the crossing thereby made greater, then it became his duty to exercise such additional care and caution in approaching said crossing as a person of ordinary prudence would have exercised; and if you further believe that he failed to exercise such additional care, if the surroundings demanded it, and such failure contributed directly to the accident in question, then you should find for the defendant, even

though the railway employés should have been negligent in the matter of speed and signals.

FINCH & THOMPSON,
Att'ys for Def't Tex. & Pac. R'y Co.

Refused.

W. D. HARRIS, *Co. Judge.*

Filed February 13th, 1891.

JNO. P. KING, *Co. Cl'k.*

16 *Special Charge Asked by Def't, No. 3.*

Filed February 13th, 1891.

In County Court, Tarrant County, Texas.

ROSEDALE STREET R'Y CO.
vs.
JOHN C. BROWN, Receiver, *et al.* } No. 2730.

You are further instructed, gentlemen of the jury, that it is the duty of every one about to cross a railway track, and before he does do so, to make a careful and diligent use of his senses, both of sight and hearing, if the surroundings demand it.

If, therefore, you believe from the evidence that the plaintiff's driver in charge of the car damaged failed to use his senses, and that such failure contributed to the accident in question, then you should find for the defendant, even though the servants in charge of the engine and cars should have been negligent in the matter of speed and signals.

FINCH & THOMPSON,
Att'ys for Def't T. & P. R'y Co.

Refused.

W. D. HARRIS, *Co. Judge.*

Filed February 13th, 1891.

JNO. P. KING, *Co. Cl'k.*

17 *Special Charge Asked by Def't, No. 4.*

Filed February 13th, 1891.

In County Court, Tarrant County, Texas.

ROSEDALE STREET R'Y CO.
vs.
JOHN C. BROWN, Receiver, *et al.* } No. 2730.

You are further instructed that if you believe from the evidence that the box cars complained of stood upon a track which was rightfully constructed, *when* it was shown to be, and that the cars were properly and of right placed thereon, then defendant would

be guilty of no negligence in this respect, and you cannot find for plaintiff by reason of the negligence alleged on that point.

FINCH & THOMPSON,
Att'ys for Defendant.

Refused.

W. D. HARRIS, *Co. Judge.*

Filed February 13th, 1891.

JNO. P. KING, *Co. Clk.*

Special Charge Asked by Def't, No. 5.

Filed February 13th, 1891.

18 In County Court, Tarrant County, Texas.

ROSEDALE STREET R'Y CO. *vs.* JOHN C. BROWN, Receiver, *et al.* } No. 2730.

You are further instructed that positive evidence upon a given point is worth more than negative upon a given point, where there is a conflict; and if there be a point in controversy with positive testimony on one side and negative on the other, then you should give credence to the positive testimony, other things being equal.

FINCH & THOMPSON,
Att'ys for Defendant.

Refused.

W. D. HARRIS, *Co. Judge.*

Filed February 13th, 1891.

JNO. P. KING, *Co. Clk.*

Defendant's Motion for New Trial.

Filed February 14th, 1891.

In the County Court of Tarrant County, Texas.

ROSEDALE STREET R'Y CO. *vs.* JOHN C. BROWN, Receiver, *et al.* } No. 2730.

Now comes the defendant The Texas & Pacific Railway
19 Company, by attorney, and moves the court to set aside the verdict and judgment herein for the following reasons, viz:

1st. Because the verdict is not supported by the evidence and is contrary to law, in that the former showed conclusively that defendant and those in charge of the train *was* guilty of no negligence, either in the matter of speed, signals, or the box cars complained of.

2nd. The verdict is contrary to the law and the evidence, in that the latter showed, even by the admission of the driver of the street car, that the latter used no care or caution at time and place of accident, but was guilty of the grossest negligence in not using his senses by way of precaution before driving on the railway track.

3rd. The court erred in overruling defendant's general demurrer and in failing to charge on defendant's special defense that plaintiff should have applied to the United States court which appointed the receiver for an adjustment and payment of its claim.

4th. The court erred in failing and refusing to give defendant's special charges numbered one, two, three, four, and five.

5th. The verdict is contrary to the law and the evidence, in that the jury evidently applied the law of comparative negligence, which is not in force in this State.

20 Wherefore defendant prays for a new trial herein.

FINCH & THOMPSON,
Att'ys for Def't T. & P. R'y Co.

Filed February 14th, 1891.

JNO. P. KING, *Co. Clk.*

Order on Motion for New Trial, February 23rd, 1891.

ROSEDALE STREET R'Y CO. *vs.* JOHN C. BROWN, Receiver, *et al.* } No. 2730.

MONDAY, *Feb'y 23rd*, 1891.

This day came the parties, by their attorneys, and then came on to be heard the defendant Texas & Pacific Railway Co.'s motion for a new trial herein; and, the argument of counsel being heard thereon, because it is the opinion of the court that the law is for the plaintiff, it is therefore ordered that said motion be, and the same is, overruled; to which ruling of the court the defendant excepts and in open court gives notice of appeal to the court of appeals of the State of Texas.

21 *Motion for Ten Days to File Statement of Facts.*

Filed February 24th, 1891.

In County Court, Tarrant County, Texas.

ROSEDALE STREET R'Y CO. *vs.* JOHN C. BROWN, Receiver, *et al.* } No. 2730.

Now comes the defendant The Texas & Pacific Railway Company and moves the court to grant ten days from the adjournment of court in which to file statement of facts, as the stenographer, M. Scougale, who took the testimony, says he is engaged in the Imboden trial and may not have an opportunity to write out his notes before adjournment.

FINCH & THOMPSON,
Att'ys for Def't T. & P. R'y Co.

Filed February 24th, 1891.

JNO. P. KING, *Co. Clk.*

Order on Motion for Ten Days, February 24th, 1891.

ROSEDALE STREET R'Y CO.
vs.
JOHN C. BROWN, Receiver, *et al.* } No. 2730.

TUESDAY, *Feb'y 24th*, 1891.

Ordered that defendant Texas & Pacific R'y Co. have ten days after the adjournment of this term of court within which to prepare and file a statement of facts herein.

22

Statement of Facts.

Filed March 10, 1891.

In the County Court of Tarrant County, Texas, January Term, A. D. 1891.

ROSEDALE STREET R'Y CO.
vs.
JOHN C. BROWN, Receiver, *et al.* } No. 2730.

Statement of facts admitted in evidence on trial of above case.

JAMES HUKILL, called by the plaintiff, testified as follows:

I saw the accident which is the subject of this suit. I was running the street car at the time the accident happened. It was street car number 2, belonging to the Rosedale Street Railway Co. As well as I recollect, the accident occurred some time in May, 1888, on Front street, right by the side of the T. & P. track, the side track they had put in, running in back of Joe Brown's wholesale grocery house, and there were cars on the right, so that I could not see to my right at all. We were in about 6 or 8 feet of them, I reckon—that is, our track—and the cars were about 6 or 8 feet apart
23 and I could not see until I got right on the track, and when I did there were cars on this track that ran in back of Joe Brown's, and when I did get there I was right on the track before I could see down this other side track. The train was backing right on the track, and I had not time to get away at all. They ran right into the car and mashed it all to pieces. I don't reckon the cars were over ten feet from me when I saw them. I was driving a mule car. The mules were on the track. I was going to the Union depot. One of the T. & P. side tracks lay right along by the side of the street-railway track, and the other came right across the street-car track. The cars were standing on the one that lay parallel with the street-car track. I don't know how far it was from the street-car track. I suppose it was about 8 or 10 feet; maybe more and maybe not quite so much. There were a row of cars standing on the side track running down Front street. The side track is on

Front street, running toward the depot. The other side track crossed Front street, running behind Joe Brown's wholesale grocery house, and that side track that runs in behind Joe Brown's building was the one that the train of cars was going on at the time they ran over my car. The cars standing on the side track up and down Front street were box cars. I could not see to my right until
24 I got right — of the track. Between the crossing of that other side track and the cars standing on this parallel side track there was just room enough for the train to go between. I could not tell how many feet apart the cars were; probably eight or ten feet from the crossing on each side. There were box cars on both sides of this crossing on Front street, and they just left an opening for train- to back in behind Joe Brown's building. The train that ran over me was backing. I could not give much of an idea of the speed at which it was running; it was not running very fast. They were close on me. I think I would have an idea about how fast they were running; I suppose they were running about ten miles an hour. The train that ran over my car gave no signals that I heard. It was not ringing any bell; I never heard it. It was not blowing any whistle. It was not possible for me to have seen that train any sooner than I did, because those cars on the parallel side track were in the way. The cars were above me, and of course I could not see over them. They were on Front street, right by the side of me. They were right down by the side of the *side of the* street-car track. I think there were about seven or eight of those cars, extending over Rusk street back to Main street. They extended clear up to Main street. They were not attached to any engine; just left side-tracked there.

25 Where the track crosses the Main-street line, just this side of the Union depot, there was an engine crossing there, with some box cars. That is where they crossed the Main-street line and where they crossed our line, just this side of the Union depot. This train was backing, and I saw it when I was crossing Main street and before the cars on the side track obstructed my view. The distance around that side track over where I saw them crossing up to where the accident occurred I suppose was something between three or four hundred yards. From the place where I saw them down to where the accident occurred was a block, a little larger block than the common block. If there is 200 feet in a regular block here, there must have been about 250 feet in that block. I don't know whether the train I saw at that time was the one that ran over me or not. The one I saw was backing, coming around the "Y." I did not see any other train on the track between me and where that one was. If that was the same train that ran over my car, it ran that three or four hundred yards while I was going that 250 feet. I was just going on a trot with the mules. I was not going very fast—about four or five miles an hour. When they ran over my car they just mashed it all to pieces, and threw one of the box cars off the track. When I first saw those cars the mules were right on the track, and before they could get the car across, the train had run over it.

Cross-examination:

I had been driving for that street railway only a year at that time, during part of which time I had been driving down to the Union depot. Those street cars ran up to the Union depot, turned there at Jones street. Our line crossed this "Y" where I saw this engine and car coming down. The Jones-street line crossed about the same place, and also the Main-street car line.

The three street-car lines crossed up there about the Union depot. My car was running about 4 or 5 miles an hour; I don't know exactly how fast. Referring to the map now shown me, I came down Houston street to Front street, the track that went down Front street to the end of Jones street and across to the reservation over toward the Union depot. The cars I speak of were standing on the side track, on this track that comes in over toward the Union depot, across the reservation, and along Front street, on the south edge of Front street; I do not know whether in the street or not, but it is along the edge of it. The place where I first saw this engine and cars was right where this "Y" crosses the street-car line. If that car struck me, it had to make the curve around the "Y" to come down here back of the Joe Brown building. The engine was
27 south and the cars north while backing in there. It was the car that struck me. That would be the only way they could put cars in there at Joe Brown's and get out with the engine.

The Joe Brown switch is a blind switch which runs down about to Fifteenth street.

When I first saw the back end of the car that struck mine it was about ten feet from me, something like that, and at that time my mules were just about on the track; they were just about going on the track with their feet. From the mules' heads to the middle of the street car was something like 12 or 13 feet, I reckon. The box car hit the street car about the center. I was on the front end of the car. I jumped off before it hit. I jumped off on the north side. I was on the east end of the car. I jumped off on the east side of the Joe Brown switch and north of the street-car track. It did not hit the mules at all. Before I reached the track I did not look out for those cars in any way. I could not see. I did not stop. I did not listen for it specially. I always listen. I was not looking at this car that came in there. I could not see it that way at all until I got down there. I did not expect it at all. I was not specially looking for it. The first I knew of the car was when I got around the end of the box cars. When it was right on me I saw it. It
28 is common for those cars to stand there in that fashion, on the south end of that track. Every few days they would switch them in and out. I knew it was a dangerous place if a man was not looking out. It was a crossing where it would require caution on both sides in order to present collission- while those cars were standing there. There was nobody in this car that I was driving.

Redirect examination:

When I left Main street I looked down and saw this engine.

Recross-examination:

I knew this "Y" track was in there, twisting around towards Joe Brown's, before that.

Redirect examination:

If there had been any bell rung or whistle blown I think I would have heard it. If I had heard it I would not have gone into the yard. I had been driving up and down that track about six or eight months, I reckon; maybe a little longer; maybe not quite so long. I had never had any accident before. Trains came up on that Joe Brown side track once in a while; not a great many
29 of them, though. He uses it for his own. Nothing came up there except for Joe Brown's business.

Recross-examination:

I knew that Joe Brown switch was there. I had seen them coming there frequently, carrying cars.

Redirect examination:

Front street is a public street of the city of Fort Worth. There were box cars on both sides of that crossing, on the switch that went up behind Joe Brown's; there were several box cars standing below. I think there were two cars ahead of the engine, on this "Y" track.

Recross-examination:

Front street is on the north edge of the reservation; just skirts the north side of the reservation east and west. I do not know whether Front street was on the reservation or not.

ANDERSON CAVIL, for the plaintiff, testified as follows:

I saw the accident in question. I was on the street car on the Main-street line, coming up from the depot. The Main-street car track along Front street lies south of the Rosedale track; I was between Calhoun and Rusk streets; the accident happened
30 at the crossing of Front and Rusk, about the head of Rusk. I was about midway of the block from where the accident occurred. I think those blocks are 200 feet square. The train was backing down; it was a Texas & Pacific train—at least, the train was on that track. I do not know one train from another. The train was backing up the switch that is called the Joe Brown switch; it was backing to the building and the boxes ran into the street car. I did not hear any bell rung or whistle blown. I guess I would have heard it if there had been any. I was not expecting the accident to happen before it did. I do not know how fast the train was backing, but it was running pretty fast; running fast enough to knock the street car off the track; could not tell how many miles an hour it was running. I have no way of knowing

anything about it. When we started out from the depot the trai
came past us at what was called the "Y," and we stopped there
let it pass—that is, the street car did. I was on the rear end, an
after that passed I did not think anything more about it—that w
were out of the way—until I seen the street car approaching. I su
pose it was about two lengths of the car from the engine when
first seen it; when I seen it so nigh we could just see the mule
head- show up behind the cars, and I seen then it was in dange
When I first saw the mules' heads they were right on th
31 track, approaching the track. The train knocked the stree
car over and tore it all to pieces. The driver jumped off nea
the mules and saved himself. I first saw the mules coming ou
from behind those cars that were standing on the track on Fron
street, standing right along by the side of the Rosedale street-ca
track, from Main all the way down to Rusk—down to the switch
I was on the rear end of a Main-street car, on the north side of th
rear end, on the side next to the accident.

Cross-examination:

I was on the rear end of a car on the Main-street car line; w
were going west, toward the accident. There were a great many
others on the car I was on; a great many on the front end and on
the rear. Witnesses who are here now under the rule were there
The following-named black men were there: Dave Perkins, Tom
Owens, and Robert Hudgins. They are all men of color and I am
too. I don't remember any of the white men that were there
There were a great many passengers on the car, and the car wa
full on the Main-street line. I don't know that I understand th
map now shown me. The "Y" track crosses the Main-street ca
line and the Rosedale street-car line right near the Union
32 depot. We stopped east of the "Y" and waited for the train
to cross, going west; then after it passed, going west, ou
car drove up toward the place where the accident occurred. I don'
recollect how many cars there were with the engine. It seems to
me, to the best of my knowledge now, that there were about 4 or 5
maybe 6. I don't know exactly the number, but there was quite
a number. We were waiting for it to clear this crossing before we
started up. I don't remember how far the train got from the
crossing before we started: it got out of the way and we all drove
up. When the accident occurred we had got down midway be
tween Calhoun and Rusk.

Redirect examination:

Dave Perkins was with us at the car before we left the depot, and
was with us at the car when the car was waiting for the track to be
cleared so that we might pass, but whereabouts on the car I do not
know. I am sure Tom Owens was on our car and Perkins was with
us at the car, but whereabout on the car he stood when the accident
occurred I do not know.

DAVE PERKINS, for the plaintiff, testified as follows:

I saw the accident in question on or about May 3rd, 1888. I was meeting the car at the time. I was on the Rosedale street-
33 car track, coming from the Union depot, and this car that was smashed up was going to the Union depot. I don't know the exact distance we were from that car. We were just about to the Windsor hotel when it struck. I was on the front end of the car. I could see up and down the Rosedale track; could see clear up as far as Houston street. I could see this car that was coming down that was struck. We was driving pretty fast when that car got to the switch—before that car got there. The train was coming around the "Y" from the Missouri Pacific and going up to Joe Brown's building or back of Joe Brown's building. The only whistle they blew was for the crossing up there near that crossing right at the Union depot, coming from the Missouri Pacific track, coming on across. There is a crossing there. They blowed there, and crossing these other two tracks, Main street and the other, there was no blowing and no bell rung; the train was backing. I don't know how fast it was backing around there; I don't know anything about it. Of course, it was backing pretty fast. I don't know anything about no time. It was coming faster than the street car that was coming down—a good deal faster. From the way it was rolling, it seems it was going about twice as fast. The street-car mules were in a trot. I can't tell anything about how fast the mules were going because I don't know. I cannot tell anything about the distance they traveled. There was an-
34 other switch on the Texas & Pacific on Front street which was full of box cars, side-tracked and standing there, I suppose, to be unloaded. They were standing there today, just the same, on Front street. These box cars were right along by the street-car track where this car was coming down. I don't know the distance they were from the street-car track, but the railroad track, I suppose, was just about as wide as this platform on which I am sitting (about — feet). The driver of that street car could not have seen those cars backing up there before they struck him, because the box cars hid the train that was coming down there. There was an opening left in those box cars for cars to go up that Joe Brown switch. There was an opening about four feet from the track where the cars stood on each side; about four feet of a crossing there. There were cars both sides of that crossing, and they extended up to about four feet of the crossing. When the driver of the street car was driving up there he could not have seen the train before the mules struck the track, to save his life, and when he seen them strike the track he gave them a lick to get them across, and just as he got across, the train came into him. I didn't see how it kept from killing the mules, too. At that time I was representing the Hotel Ellis. It was my business to go up and down for my passengers. I got free passage over the line
35 on account of putting the passengers on that line. It was my custom to look out and watch for those things—that was

my orders from my employers. I did that generally—kept a loo
out—and do until this day, on account of the safety of passenge
Of course, if I did not pay attention to passengers, Mr. Hutchins
and Mr. Miller both will tell me right straight, "If you cannot pa
attention to my passengers and see them get off all right, I do n
want you." Of course, that is my orders—to look out for the pa
sengers. I saw this train backing around up there before it got
the crossing. As we were coming from the depot it was goin
around that way. They passed us right in front. When I saw
was going down there and saw that car coming down, my attentio
was necessarily called to it because it was going down, and I see
it was going down to Joe Brown's. It was backing down so fast
knew it was not going to stop before it got to the Main-street cross
ing. My attention was called to it on that account, and just as
ran in I was looking. My attention was called to it then, to se
whether or not there was going to be an accident, and in place o
standing on the car I got off and ran up there at the time the ca
busted up. There was no whistle and no bell ringing at all.
pay strict attention to that all the time. If there is a bell ringing
or whistle blown, I am looking around to see where it is, and
36 I was paying more attention because I saw there was liable
to be an accident, and I thought there was some passengers
coming down on the car.

Cross-examination:

My orders were to look out for the passengers from the hotel.
My business is to look out for the passengers when they are coming
down, to see if they get off safe. When I am looking out for them,
if I see a car cooming I am going to look out for a car. Very often
I am on a car and I hear a train blowing. If I have got any pas-
sengers on thereof I will watch the train, so that if the driver did
not see it I will. I was down about the Windsor hotel when the
accident occurred. The Windsor hotel is down on the corner of
Jones and Front streets, and Calhoun street is between Rusk and
Jones. That would put from the scene of the accident about the
width of two blocks, the width of one street, the full width of two
blocks and part of width of the other street. We were just turn-
ing the corner in front of the Windsor hotel when the accident oc-
curred. When this engine and cars crossed the street-car track up
there on the "Y" toward the Union depot, I was on the street car
there. We waited at the crossing for those cars to get out of the
way. I had no passengers on that car. We were just going down
to meet the car that went to meet the train that was coming
37 in. We were in a hurry to get down to the switch, so as to
let this car in.

I spoke about some cars being there on that Front-street side
track. There were cars on both sides of the Joe Brown switch.
The cars on the west side extended clear up to Main street and the
cors on the other side extended down near that branch down there.
There were five or six cars down below the switch. I first saw Hu-

kill when he turned the corner of Houston street, just a block west of Main. When I saw him there I was at the Union depot and we started out from there at that time to meet him on the switch. We were crossing the "Y" when I first thought Hukill was in danger. We could see Hukill coming down the track, and those cars were coming down. The cars on the Front-street side track did not keep me from seeing him. I was on the front end of my street car. The driver was with me. Nobody else was on the car.

Redirect examination:

The driver's name was Lon. I don't know what his other name is. We call him "Shorty" all the time. I don't think he lives here now; I understand he has gone over to Dallas. He has been working on the line several times since then.

38 TOM OWENS testified as follows:

I saw the accident in question. I was on the Main-street car coming up from the depot. I was on the car with Anderson Cavil. We were going up on a Main-street car and the engine was running across the track, and we stopped, and about the time we got across we saw the Houston-street car coming down, and the engine ran along and knocked the car off the track. The Texas & Pacific train that came around on that "Y" was going in behind Joe Brown's building, on the crossing on Rusk street. It was not blowing any whistle nor ringing any bell. The train was running so fast—I could not tell exactly how fast, but running pretty swift—around the "Y." I could not tell about how many miles an hour it was; I reckon, to the best of my knowledge, maybe 15 miles an hour, backing around there. That is my best guess at it. The driver on the Rosedale car—the one that was smashed up—could not have seen the car approaching before the accident occurred, because the box cars were between him and the engine, on that side track which runs up and down Front street by the side of the Rosedale track. There was little vacancy for the engine to get through; that is all. They were box cars all coupled up together from Main street clear down to Rusk, right along by the side of the Rosedale track, and there were loose box cars down below the crossing, on both
39 side of it. To the best of my knowledge, they extended to about eight or ten feet from the crossing. I never paid much attention to it—just a space left in between there. I saw the engine backing there and saw an accident was going to happen and my attention was called to it on that account.

Cross-examination:

I stood on the platform with Anderson Cavil. I never measured the distance between those box cars. I saw the car when it came around the "Y" and crossed the street-car track near the depot. It was the same engine and cars that came down on the Joe Brown

track. The engine was all I saw, just the naked engine. There were not two or three or four or five cars with it; nothing but the engine.

Redirect examination:

If there was the tender and one or two cars I don't recollect it. I don't recollect whether there was or not. It was a little short thing. There may have been the tender on, but that is all—the tender and engine. The tender and engine is together all the time, you understand; but I don't think there was any box cars. I believe the engine was running forward. I think—yes, it was running forward.

40 W. B. QUIGG, for the plaintiff, testified:

I did not see the accident that has been testified about. I went down there a short time after it happened. When I went down there those box cars were standing on the track. The Rosedale street-car track runs down Front street. We have a double track on Front street. There is a Texas & Pacific railway switch on Front street running parallel with the Rosedale street-car track. I think at the upper or west end of it it —, perhaps, five feet from the Rosedale track rail and the lower end is about 16 or 18 feet; sort of diverges as it goes east. The switch that goes in behind Brown's crosses right on Rusk street, at the crossing of Rusk and Front streets. I went down there and measured at the time. On the side track between Main street and where this accident happened there were about seven box cars. I measured the distance of that line of box cars from Main down to Rusk. I think it was 280 feet; somewhere along there. It was a line of box cars extending
41 along by the side of the street-car track and parallel with it somewhere about 280 feet. The space at this crossing between those box cars left for the T. & P. train to back in behind Joe Brown's, if my memory serves me right, was about a car-length, about thirty or thirty-three feet. Some box cars are 33 feet in length and some as high as 40. Those cars, I think, were the ordinary customa-y length, those that were standing there, about 33 feet, and the couplings and drawheads make them, I suppose, that much longer.

A street-car driver coming down Front street, after he got behind those box cars, could not see this train backing in there on the Joe Brown track because of the height of the box cars and he being so close to them. There is a hood over the platform of the street car, where the driver stands. The hood is about a foot or 15 inches above his head. I think a street car stands about nine feet from the track to the top of the car. The driver stands on a platform in front that is about 18 inches, perhaps, from the ground. A driver of Hukill's height—his head would be about seven feet, I should think, from the ground; somewhere in that neighborhood. This accident happened on the crossing of Rusk and Front streets.

(The defendant introduced in evidence said city map, from the foot of Grove street, including the Missouri Pacific, M., K. & T. R'y track, and northwardly to 16th street, including the Joe Brown building, and the foot of Main street and the Y, &c.)

The car that was broken up was purchased along in May or June; it was two years old in May. When we put on the electric car line we sold out the other street cars that were bought at the same time this was. Some were bought earlier. We sold those cars in June or July, 1889, perhaps. The cars purchased at the same time that this one was purchased, we sold them for $125 apiece.

The Joe Brown switch was a blind switch. Cars were put in behind Joe Brown's grocery store and unloaded; the engine had to back cars in there, and pull out, and leave them there. I do not think we used any part of the car that was broken up; did not use the wheels nor the axles. I have sold off nearly all the old iron for scraps; sold the wheels for old iron. If we could get anything for the axles, we sold them; we got so much a pound for the cast iron.

Front street runs right along north of the reservation. I think Front street is opened up the whole length of the reservation, west. There is a track right up against Tatum's mill, but there is a street through there; they haul out coal there all the time. There
46 is no foundary or iron works east of Tatum's mill; they moved that further out west. I don't know when the street was opened up through there; at the time they put rock in there; it is about a year, I think; maybe more than that. I have been here six years. It is a fact that when I came here Front was not opened up and gravelled along by the Joe Brown building; that was done afterwards. When we first put our track there we did not run down only just across Rusk, and then across the reservation. Hughes graded and gravelled the street while we were putting in our track. Front street is right on the north edge of the reservation; the reservation comes right up to it. The side track these cars were standing on was there when we built our street-car line and has been there ever since.

I think a street car is about nine feet high. Box cars run all the way from ten to twelve feet high, I think. I testified on this trial before. I went down and measured the distance between those cars that were standing there. I think I testified on the other trial that the distance between them, by my measurement, was 33 feet. I did not testify that the distance from the car on the west side of the Joe Brown switch up to the Joe Brown track was 18 feet. I think this place right here was 18 feet. It was not 18 feet from the nearest car to the Joe Brown track; 33 feet was the opening. I don't
47 remember testifying that the distance from the car on the west side up to the Joe Brown track was 18 feet. I do not remember now what that distance was. I made a memorandum of the whole distance and gave it to my attorney here and went down to look at it a while ago and could not find it. The following, from the statement of facts of the last trial, I think is about correct: "About 33 feet from the car on the east to the car on the west; 33 feet from

the car on the west side of the railroad track and 18 feet to the cars standing long the side of the street-car line." I think that is about what I stated. "From the car on the west side to the railroad track was 18 feet." I think they must have got that down wrong; the cars standing along the street car line. My recollection is it was 18 feet there (witness designates some part of the map), because here was a street line, our track running down, and their track swings off a little from ours as it goes east.

Redirect examination:

I sold some of the street cars afterwards for $125 each. Cars were cheap at that time because the electric system had been adopted and all the mule cars were thrown out. Of course, that threw a great many of them on the market; it was better to take anything than to let them stand idle. The cars I sold were not in as good condition as the one that was smashed; cost some two hundred dollars
48 to put them in running condition. The map which has been shown me is approximately correct (meaning the map produced by plaintiff). The map of the city (produced by defendant) is also approximately correct.

The plaintiff introduced an ordinance of the city of Fort Worth prescribing that railroad engines and trains shall not run more that six miles an hour within the city limits of Fort Worth.

Plaintiff read the depositions of John C. Brown, as follows, plaintiff offering the 2nd and 3rd paragraphs of the direct and fifth of the cross examination, and the defendant the remainder of said depositions:

John C. Brown.

My name is John C. Brown and I am at present engaged in railroading, as president of the Texas & Pacific Railway Co. My business residence is at Dallas, Texas. During the years 1887 and 1888 I was receiver of the Texas & Pacific railway. I ceased to act as receiver of the Texas & Pacific Railway on the 31st of October, 1888, under the order of the court in the case of the P. M. R'y Co. *vs.* The Texas & Pacific Railway, in the United States circuit court at New Orleans.

2. When I was discharged as receiver I was directed to turn over the property, money, funds, and assets of the railway to the
49 corporation known as the Texas & Pacific Railway Company; this occurred about the 31st day of October or about the 1st of November, 1888. This, as stated before, was under the orders of the United States circuit court by which I was appointed receiver. Said property was under the control of the court in 1887 and 1888 and I managed the same by orders of said court made in this cause from time to time.

Answers to Cross-interrogatories.

1. I was neither an officer, director, nor stockholder of the Missouri Pacific Company on the 15th day of December, 1885, and

cannot recall, if I ever knew, the names of all of them. Jay Gould was president; Mr. Calef, of New York, was treasurer and secretary, and I think Mr. Hoxie was one of the vice-presidents. I cannot now remember the names of all the officers at that date.

2. Jay Gould was president of the Texas & Pacific Railway Company at the time specified. I was one of the vice-presidents and tendered my resignation at the time I was appointed receiver. Jay Gould, Russell Sage, A. L. Hopkins, George J. Gould, and others, whose names I do not now remember, were directors at that time.

3. The officers of the Texas & Pacific railway at this date (February 23, 1889) are John C. Brown, president; George Gould, vice-president; C. E. Satterlee, secretary and treasurer, and the same parties are directors, as well as Russell Sage, W. C. Hall, of
50 Louisville, Ky.; I. J. Wister, John Markhoe, and Mr. Winsor, of Philadelphia; George B. Roberts and Mr. Hutchinson, of the same place; Samuel Sloan, C. M. McGhee, A. L. Hopkins, of New York; John A. Wright, of Philadelphia; Robert Flemming, of New York, and S. H. H. Clark of St. Louis. The local treasurer is Guy Sumpter and the auditor is Richard Fenby. W. W. Abrams, of Dallas, is ass't secretary.

4. I was not present at any agreement or understanding between the railroad companies mentioned, and if any was made I have no knowledge of it. The attorneys of the T. & P. railway were present at the time the order was granted, as I am informed, and the company filed its answer (but I did not answer myself nor sign the answer for the company), and that answer is on file, I suppose, with the papers in the case of The Missouri Pacific Railway Company *vs.* The Texas and Pacific Railway Company, in New Orleans, in the United States circuit court for the eastern district of La., and will show accurately what it contains, which I am not able to state from memory.

5. Large sums of money were expended by me and by my co-receiver in the betterment and improvement of the property of the railway. These sums were derived partly from receipts and the income arising from the use, operation, and management of the railway and partly from contributions of ten per cent. made by stockholders who were the holders of full-paid certificates of
51 stock—about an equal amount from each source. The amount and character of improvements and betterments were about 700 miles of new steel rails to replace old, worn-out, and no-longer-serviceable iron rails, costing about $2,500,000; purchasing and putting in new ties to replace old and worn-out ties, over $750,000; new locomotives and fixtures, costing about $250,000; new side tracks, nearly $120,000; new freight cars, amounting to over $400,000; ballasting on the New Orleans division, about $400,000; raising track on that division, about $180,000; widening embankments, filling trestles, ballasting, etc., about $170,000; labor laying steel rails and costs of fastenings for same, about $300,000; besides a great many other items, too tedious to mention, amounting in all to about $5,500,000. All these expenditures were made under the orders of the court, and many more, also, as I have said, too tedious

to enumerate, and made after the court became satisfied that they were necessary for the safe and proper conduct of the business of the road, both in reference to its own economic operation and to meet the demands of the commerce of the country. Said orders will all be found, I presume, on file in the records of said court.

6. After the filing of the bill by the Missouri Pacific Railway Company and the appointment of a receiver as aforesaid bills were filed in the same court by the trustees on all the mortgages to secure the outstanding bonds issued by said company, being four
52 or five suits in number; the causes were virtually consolidated, and the decree and order in all of them ordered the foreclosure of the mortgage and the sale of the property.

The property was offered for sale in accordance with such decree and bids received and returned to the court; but before the period arrived, under the rules of the court, for confirming the sale three classes of bondholders agreed among themselves to cancel the former mortgages and bonds issued thereunder and take new bonds bearing a lower rate of interest in lieu of the bonds so surrendered, and the income and land-grant bondholders agreed to take the lands and a certain amount of bonds and to surrender and have cancelled therefor their income and land-grant bonds. The property was not turned over to the reorganized company only as stated in my examination-in-chief, and I had no express understanding or agreement or any other understanding or agreement with the company as to its liability to me for any sums of money recovered against me by reason of my receivership, either verbally or in writing. My only protection was that afforded by the order of the court discharging me as receiver, with which I am perfectly content.

7. The reports made by me and my co-receiver were made to the United States circuit court for the eastern district of Louisiana, in the city of New Orleans, in the case already mentioned, passed
53 upon and filed in such case, and have become part of the records of the court.

8. My accounting was made with the court and under the orders of the court up to the date of my discharge, and is shown by the records of said court. I have no knowledge of any agreement made between me, as receiver, and the Texas & Pacific Railway Company, as now existing or as it existed on the 31st day of October, 1888.

9. I have no agreement or settlement or promise of adjustment between the Missouri Pacific Railway Company and myself, nor was I party to any such agreement, adjustment, or settlement.

10. I was not a party to any agreement between the Missouri Pacific Railway Co. and the Texas & Pacific Co., plaintiff and defendant in said original bill, but it is no doubt a fact that such a settlement and agreement between them was made, and I have no doubt it is a fact that all parties interested consented to the same; but I have no such paper, and no such paper is accessible to me more than to the parties to this suit, for I presume, although I do not know the fact, that it is on file in the records of this case in New Orleans. I have no papers or agreements between such parties

and myself as receiver, and therefore cannot produce copy. There is no misunderstanding or agreement between me, as receiver, and such parties above stated. As a fact, there is no such agreement or understanding between said railway company and myself.

54 *Deposition Taken February* 23, 1889.

J. W. WATSON, for the defendant, testified:

I am night yardmaster of the T. & P. railroad at Fort Worth. Our yards include the switch that runs along Front street and the one that ran down by the Joe Brown building. I have been three years in that yard. The map now shown me is an approximately correct representation of the course of the "Y" that goes around from the Union depot down to the Joe Brown track, and of the street-car and other lines that cross it. That Y crosses two street-car tracks; it crosses the Santa Fé and the H. & T. C. railroad tracks. Then there are two switches to go into Joe Brown's—what we called the house track and the *black*-house track. Then the Main-street line and the Houston-street line crosses the track on Front street. That track is not in a very good shape; it is about the same shape now as it was then. It has never been kept in good shape; bad iron in there and bad ties. They generally take old iron out of the main line for such a place as that. I think six or eight miles an hour would have been perfectly safe rate of speed for an engine to run, with two or three cars, around from the Missouri Pacific yard and down the Joe Brown switch. Some of our engines will not curve in there, on account of the curve being so short and sharp.

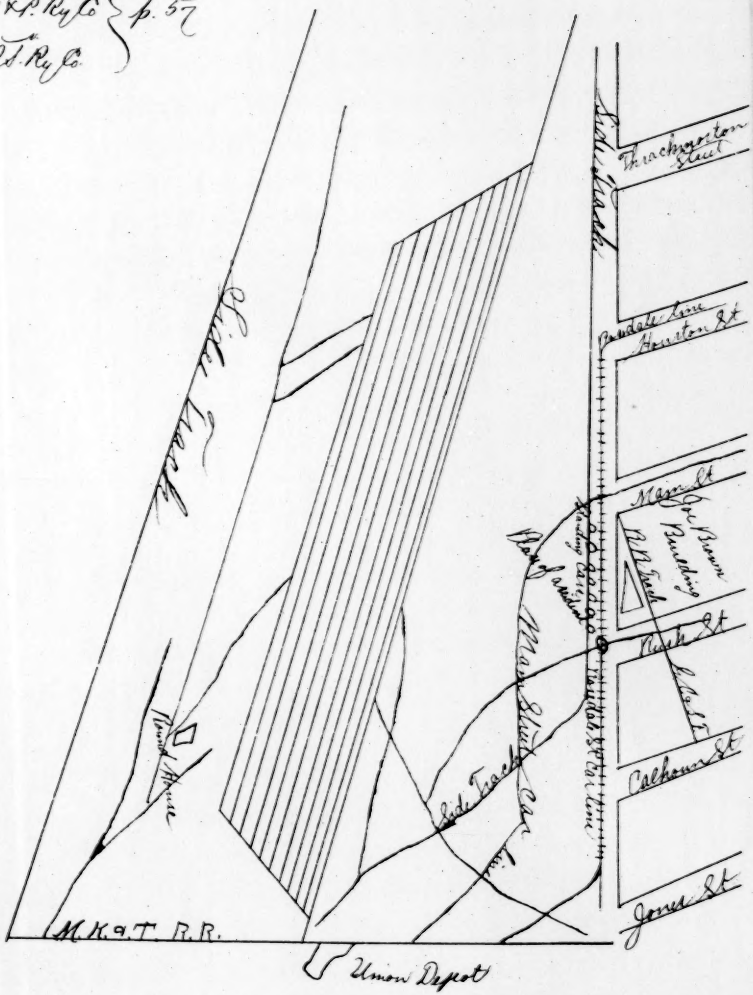
55 The Texas and Pacific track on Front street is used for unloading teams and freight. They use those side tracks for making up trains, and these side tracks are used for unloading freight out of the cars with teams and such as that. The Front-street side tract is used especially for a team track. These tracks alongside of the main line, in the center of the reservation, are used for handling trains—making up trains coming in and out.

B. F. PAGE, for the defendant, testified as follows:

I am a locomotive engineer and have been so engaged since 1882; have been here at Fort Worth since 1880, and on the yard at Fort Worth since 1882, running a switch engine for the T. & P. R'y. I am acquainted with the location and construction of the Y that comes out of the Missouri Pacific yard and runs around across the street-car tracks and curves around in the Joe Brown switch. I have had occasion often to go in that switch, taking in transfers and coming out. They go in there pretty nearly every day, and sometimes oftener than that. About May, 1888, an engine coming from the Missouri Pacific yard to go into Joe Brown's building would have to cross two street-car tracks; one of the street-car tracks comes down Front street to the Union depot. The engine would pass a switch about seven car-lengths or about six car-lengths east of the

Plat of track at and about scene of accident copy from City map introduced by Defendant.

No. 114
T. & P. Ry Co
R. & T. Ry Co
} p. 57



freight-house; that is the first switch leading into Joe
56 Brown's. You don't cross the Front-street side track before going into the Joe Brown switch. The street that runs from Joe Brown's down to the Union depot is called Front street, and it is graded now from Joe Brown's down past the Windsor hotel, and then there is another street-car line south of that, but that is not a street, I do not think. There are two street-car lines between the first switch—after you start into Joe Brown's there are two street-car lines between the first switch and Joe Brown's building, and one railroad track. The railroad track is between the two street-car lines, and the street-car lines, I should judge, are about forty to fifty yards apart. The engine would cross those tracks to go to Joe Brown's. In May, 1888, I could not say whether that Y was made of old iron or new iron. The track has always been a bad track, in a bad condition—short curve on it. They did not keep it up like they did the main track.

If I was going in there at this time and ever since I have been there, I always went in there very slow, on account of the track being a very short curve.

I am satisfied that a man cannot take an engine and go in there over six or seven miles an hour and stay on the track.

(Here follows diagram marked p. 57.)

58 Defendant read in evidence an instrument, duly certified, as follows:

Order on Petition of John C. Brown, Receiver, for Discharge.

THE MISSOURI PACIFIC RAILWAY COMPANY
vs. } No. 11181.
THE TEXAS & PACIFIC RAILWAY COMPANY.

On consideration of the foregoing petition, it is now ordered, adjudged, and decreed that the prayer of the same be granted, and accordingly that John C. Brown, receiver of the property of the Texas & Pacific railway in the above-entitled cause, be, and he is hereby, directed to make delivery unto the said Texas & Pacific Railway Company of all property, funds, and assets in his hands as such receiver, and that he be directed to account to said company according to his account filed and approved up to June 1st, 1888, and for all receipts and expenditures by him received and made since said first of June, 1888. Such delivery will be made as of October 31st, 1888.

It is further ordered that said receiver be finally discharged on said 31st October, 1888, from his receivership on payment of all costs legally taxed, and that thereupon his bond be vacated and cancelled.

59 It is further ordered that said property, nevertheless, shall be delivered to and received by said Texas & Pacific Railway Co. subject to and charged with all traffic liabilities due to con-

necting lines and all contracts for which said receiver is or might be held, made, or in any way liable, and subject to any and all judgments which have heretofore been rendered in favor of intervenors in this case and which have not been paid, as well as to such judgments as may be hereafter rendered by the court in favor of the intervenors while it retains the cases for these determinations, or interventions now pending and undetermined or which may be filed prior to February, 1889, together with needful expenses of defending said claims, and upon the condition that such liabilities and obligations of the receiver when so recognized and adjudged may be enforced against said property in the hands of said company or its assigns to the same extent they could have been enforced if said property had not been surrendered into the possession of said company and was still in the hands of said court, and with the further condition that the court may, if needful for the protection of the receiver's obligations and liabilities so recognized by this court, resume possession of said property.

The bills in these causes will be retained for the purpose of investigating such liabilities and obligations, and for such other purpose as may seem needful.

60 It is ordered that all claims against the receiver as such up to said 31st October, 1888, be presented and prosecuted by intervention prior to February 1, 1889, and if not so presented by that date that the same be barred, and shall not be a charge on the property of said company.

It is further — that the said receiver advertise in a daily newspaper in New Orleans and in Dallas the fact of his said discharge and a notice to said claimants to claim within the time aforesaid, to wit, before the 1st of February, and that he post a printed notice of similar purport in the station-houses of said railway.

(Signed) DON A. PARDEE,
Circuit Judge.

New Orleans, October 26th, 1888.

Defendant read in evidence an ordinance of the city of Fort Worth, No. 382, as follows:

Ordinance No. 382.

(Book B, page 163; passed Nov. 17, 1885.)

"An ordinance adopting and carrying into effect the agreement made between the committee of the common council and citizens' committee and the Texas and Pacific and Missouri Pacific Railway Companies, Oct. 20, A. D. 1885.

"The Texas and Pacific Railway Company agrees that streets of ordinary width may be maintained by the city of Fort
61 Worth exclusively at its own expense on the northern and southern margins of its reservation; but the railway company reserves the right to lay and maintain all tracks across or along such streets it may deem necessary.

"In testimony whereof the same are subscribed by the committees aforesaid and by the first vice-president of the two respective railway companies this the 20 day of October, A. D. 1885."

(Signed) J. P. SMITH, *Mayor*,
W. A. DART,
E. B. DAGGETT,
Committee of City Council.

(Signed) C. H. RINTLEMAN,
A. M. BRITTON,
W. J. BOAZ,
OLIVER S. KENNEDY,
D. N. HUMPHREYS,
W. G. TURNER,
B. B. PADDOCK,
Committee of Citizens.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By JNO. C. BROWN, *2nd Vice-President.*
THE MISSOURI PACIFIC RAILWAY COMPANY,
By H. M. HOXIE, *First Vice-President.*

That said agreement be, and the same is hereby, adopted
62 and ratified by the said city council and made an ordinance of said city, and that all necessary ordinances for carrying into effect said agreement shall be passed by said city council.

Answers of the Witness J. B. Erisman, for Defendant, Taken by Deposition January 29, 1889.

My name is J. B. Erisman; occupation, locomotive fireman, and residence, Ft. Worth, Texas. During May, 1888, I was locomotive fireman on the line of the Texas & Pacific railway. At the time of the accident I was fireman on the engine attached to the cars which collided with the street car. I was sitting in the engine, in the cab, in the left-hand seat. Said engine and cars attached to it were being backed up into the Joe Brown switch, as it is called, which is a track that crosses Front street and runs back of Joe Brown's grocery house. There were three or four cars and they were coupled on the tender of the engine and the engine was headed nearly south. The engineer was on the west side and I was on the east side. Said street car was going east, to the Union depot, and the engine at the time of the collision was about four cars from the crossing. I could not see said street car from where I was sitting on the engine and knew nothing about it until I got the signal to stop, and so know nothing of the speed of said car. Said engine and cars were going
at a very slow speed—about four or five miles an hour.
63 When we first went onto said track with the engine and cars the engineer gave the signal that is given at crossings by the whistle, and when we went on I began ringing the bell and kept

ringing the same until the accident happened. The switchman gave me the signal to stop and I gave it to the engineer, who reversed the engine and stopped as quickly as possible. Said cars standing along Front street were box cars. They were standing near the crossing. The length of a car is about 34 feet. From the east end of those cars to side track on which cars were being backed there was perhaps about room for a wagon to get by. We could have stopped within two car-lengths, with all approved appliances and if all hands had used such appliances at signal.

I was in the employ of the receiver of the Texas & Pacific at the time of the accident and now in the employ of the Texas & Pacific railway. We were expecting no collision when the whistle was being sounded, and I remember distinctly that the whistle was sounded before we crossed said street-car track, because we only crossed said street-car track about once a day and were careful to give proper signals, and I remember at said time being on my seat in said engine and watching to see that we made no collision, and that the proper signals were given, and remember hearing the whistle sounded as stated. I cannot remember every alarm
64 that was given on the different engines I helped to operate, but the reason I remember this one in particular is because, as I stated, at said place there were always so many persons crossing and street cars, and I noticed the signals there particularly. I do not remember each signal given that day, the day before, or the day after the accident occurred, nor place where they were given, but I remember the signals very well because that was the first time we had crossed there that day, and I remember ringing the bell when we went on said switch, and that the whistle was sounded. I do not know whether it was a private track where the collission occurred, running at the rear of Joe Brown's grocery store or not, but I know it was not used very often. I did not see said street car approaching the crossing where the collision occurred. I never saw said street car until the car ran over it; did not see it until it was run over. A railroad engine with three or four cars attached could not be stopped within six or eight feet unless they all had air brakes on them and with good appliances of such kind as are in general use. The side track on which my train was running was a little down grade north the way we were backing up.

I did not testify in a former trial of this case that there were cars standing on the side of track alongside plaintiff's street-car
65 track which were cut in two parts at the crossing, and that I was sitting on top end of the train as it was backing up to Joe Brown's store, and that I saw the street car approaching the place of the collision in a fast trot or gallop of the car mules behind the side-tracked cars and two car-lengths from the opening between the side-tracked cars, and that I failed to give any signal to stop or make any effort to stop my train until the street car had reached the opening between the side-tracked cars and was within a few feet of the place of collision. I was in the cab of the engine, sitting on the seat on the left-hand side.

Answers of the Witness Chas. T. Elliott, for Defendant, Taken by Deposition January 29, 1889.

My name is Charles T. Elliott; residence, Ft. Worth, Tex.; occupation, locomotive engineer. I was in May, 1888, running a switch engine in the yards of the Texas & Pacific railway. At time of accident I was on said switch engine, sitting on the right-hand side, and we were backing upon the track or switch that crosses the Rosedale street-car line and were making a transfer to Joe Brown's grocery store. There were four or five cars attached to the engine, and the engine was headed south. The fireman was in the left-hand side of the engine. The street car was going east, to
66 the Union depot, and the engine at the time of the collision was about four or five car-lengths from the street-car crossing. I don't know at what rate of speed the car was going, as I did not see it at all before the collision, but the engine and cars were going at the rate of about four miles per hour. At the time I started to back said cars and engine and before I crossed the street-car track, I gave three blasts of the whistle, and the fireman rang the bell and kept the same ringing continuously until the time of the accident, and when the accident happened the switchman gave the signal to stop to the fireman and he gave it to me, and I stopped as quickly as possible by reversing the lever. I don't remember whether any of the cars standing along Front street were flat, or coal cars, but I remember seeing some box cars. They were divided where the track crossed the railroad, and an opening of about 15 feet was left. The length of a car is about 30 to 34 feet. The distance from east end of those cars to side track on which cars were being backed up was about 5 or 6 feet. At the rate of speed at which I was going, and place also considered, the engine and cars could probably have been stopped with- 40 feet. I was at the time of said accident employed by the receiver of the Texas & Pacific railway and am now in the employ of the Texas and Pacific Railway Company. We only crossed at the place of the accident about once, or perhaps twice, a day, and street
67 cars were often on the street and persons and teams were traveling it. We were always very particular about the signals and always gave them, and remember very distinctly of giving the proper signals before said accident, and thought of it when the accident happened. I do, as a general things, remember all alarms given by engines I help to operate, and particularly the signals when crossing this street, as we only crossed about once a day and were always particular; cannot remember each signal given by my engine on that day, the day before, and the day following the accident, and the places where each signal was given, as it would be impossible to do so. It is a fact that switch on which the accident occurred was a private switch, running to the rear of Joe Brown's grocery store, and was seldom used; it is not a fact that I saw the street car approaching when it was 60 feet or more from the opening between the cars standing on the side track near plaintiff's

car track and failed to attempt to stop the train I was on, and that I made no attempt to have my train stopped until it was within 10 feet of the point of the collision. The last I saw said street car before the accident was as it turned the corner and left Main street. I do not know how far we were from the crossing when I stopped or first attempted to stop. The first and last time I saw said street car until the accident was, as stated, at the foot of Main street, and I think we were about the same distance from the street-car
68 crossing as the street car. If the engine had all approved appliances and good air brakes, on a level grade, traveling about three or four miles an hour, it could have been stopped within 6 or 8 feet. The track where the street car crossed it was about level, but the track before crossing the street-car track is down grade toward said street-car crossing. I did not testify in a former trial of this case that there were cars standing on the side of track alongside plaintiff's street-car track, which were cut in two parts at the crossing, and that I was sitting on top end of train as it was backing up to Joe Brown's store, and that I saw the street car approaching the place of the collision in a fast trot or gallop of the car mules behind the side-tracked cars and two lengths from the opening between the side-tracked cars, and that I failed to give any signal to stop or make any effor- to stop my train until the street car had reached the opening between the side-tracked cars and was within a few feet of the place of collision. I was on the cab of the engine, sitting on a seat on the right-hand side.

Answers of James M. Goodrich, for Defendant, Taken by Deposition April 22, 1890.

My name is James M. Goodrich; age, 35 years; residence,
69 Fort Worth; occupation, switchman. On May 3rd, 1888, was engaged as switchman by the Texas & Pacific Railway Company at Fort Worth. I was assisting and putting some cars in on said switch when accident occurred; was on car that struck the street car. As we approached the crossing the street car was going east to crossing; the engine whistled for the "Y" as she came up to crossing. The train was backing and I was on first car as train was going. I called to street car and jumped off and gave the signal to stop. The street car was exactly on crossing when we struck. We struck it in the side. The mules had crossed the track when the car was struck. I can't state what rate of speed either the engine and cars or the street car were going; the mules on car were running when I first saw them. The train was moving at ordinary gait and not over the limit. I know of no signal being given except what I gave myself. I gave the stop signal and called to driver of car. The street car was some distance from crossing when I called to driver. The others may have signaled, but I did not see it. I do not know how many cars there were upon the switch along Front street parallel with the street-car line. There were some coal cars. I think *there* were four or five car-lengths from the crossing on south side of said street-car track. I don't know how switch or

street had been there. I have no map or plat of the matter
70 to file. I was in the employ of the Texas and Pacific Railway Company, and am now in the employ of the G., C. & S. F. When I first saw the street car it was only a short distance from the crossing; don't know exactly how far. I was on rear car and train was backing. I don't know exactly how far I was from the crossing when I first saw the street car; some distance. I was not over a car-length from crossing when I saw it. I was sitting down on corner of car. I saw the whole of the street car when I first saw it.

Answers of Witness George Bowers, for Defendant, by Deposition Taken April 23, 1890.

My name is George Bowers; am 29 years old; occupation, railroading; was working as foreman of yard engine in Texas & Pacific yards at Fort Worth, Texas, on the date of the accident. We were backing into Joe Brown's building with 3 or 4 box cars when accident happened. I was on tank of engine. The box cars we were pushing shut off my observation and I did not see street car until it was partly over crossing. The street car was going east; we were going northwest. The head box car struck the side of rear end of street car. The mules were on east side of track when car was struck. The train was moving between 3 and 5 miles an hour. The condition of the track at that time would not admit of a faster rate of speed. I cannot say as to how fast street car
71 was moving, as it was on track when I first saw it. The signal to stop was given by Brenholtz and Goodrich, two men on top of cars. They were giving signals as I jumped off of tank, about the time the accident occurred. I heard the men on top calling and hollowing before the collision. The train stopped as soon as possible, but the car was struck before we could entirely check the train. I myself immediately repeated the signals as soon as given by men on top. There were quite a number of cars on said track south of street-car track. The cars were mixed—box, flat, and coal cars. I cannot state as to how these cars were arranged on switch. I don't remember how far they were from said switch or street-car track, but they were not very far from either one. I don't know how long said switch or street had been so used. I have no map or plat to file with these answers. I was in the employ of the Texas and Pacific Railway Company at time of the accident; am now in the employ of the G., C. & S. F. R'y Co. The street car was on a crossing when I first saw it. When I first saw the street car I was on tank of engine, about 150 feet from the crossing. I did not see the street car until it was on crossing; was on tank of engine and saw it by looking along the side of train.

J. J. GOODFELLOW, for defendant, testified:

72 I am a surveyor: have been engaged in that business ten years here in Fort Worth. I had occasion to survey the T. &

P. reservation down here at the end of Main street. I have surveyed it. The north line of the T & P. reservation is some four or five feet south of the south line of the Joe Brown building, on the line of a small iron railing they have along there near it. Front street is all on the railroad reservation, on the north part of the reservation.

Cross-examined:

I understand that Front street is a public street of the city of Fort Worth; it has only been laid out and improved by the city in the last few years.

M. SCOUGALE, for the defendant, testified:

I took down the testimony on the last trial of this case in shorthand and transcribed it. The paper now shown me, being the statement of facts of said trial, is my transcript of that testimony. I cannot testify from recollection what Mr. Quigg said with reference to the distance from the car on the west side of the railroad track to the railroad. I can only testify from my memorandum. Upon said trial Mr. W. B. Quigg testified as follows: "Between those cars lying up and down along the street-car track and space left for the train to run in between on Joe Brown's track was
73 about 33 feet; from the car on the east to the car on the west was 35 feet; from the car on the west side to the railroad track was 18 feet. The cars standing along by the side of the street-car line from Main to Rusk street were all of them coupled up."

Thereupon defendant rested.

ANDERSON CAVIL recalled by the plaintiff.

The train that ran around there and ran over the street car was backing towards Joe Brown's place. I noticed a man sitting up on top—seemed to be a switchman—on top of the box cars; the front car as it backed in there. He was looking straight eastward the way we were coming from. He was looking back that way. He was not looking toward the rear end; he was looking up towards the Union depot. He was on the second or third box. He was the only man I saw up there. He did not give any signal as I seen.

Cross-examined:

I was on the rear end of the car of the Main-street line as it came on towards Main street.

DAVE PERKINS recalled by the plaintiff:

On the train that ran over the street car I noticed a man
74 sitting on top of the car. He was sitting with his face to the east and his back to the west. He was a switchman or brakeman, whatever they call him. He did not give any signal.

The cars were going kind of north and south. He was not looking towards where the accident was.

We agree that the foregoing is a substantial statement of the evidence adduced on trial of above cause.

FINCH & THOMPSON,
Att'ys for T. & P. R'y Co.
HUNTER, STEWART & DUNKLIN,
Attorneys for Plaintiff.

Approved March 10th, 1891.

W. D. HARRIS, *Co. Judge.*

Filed March 10th, 1891.

JNO. P. KING, *Co. Clk.*

Appeal Bond.

Filed March 4, 1891.

ROSEDALE STREET R'Y CO. *vs.* JOHN C. BROWN, Receiver, *et al.* } No. 2730.

Suit pending in the county court of Tarrant county, Texas, Jan'y term, 1891.

Whereas in the above numbered and entitled cause, pending in the county court of Tarrant county, and at a regular term of
75 said court, to wit, on the 13th day of February, A. D. 1891, the said Rosedale Street Railway Company recovered judgment against the said Texas & Pacific Railway Company for the sum of three hundred and fifty and $\frac{57}{100}$ dollars, with interest thereon from the — day of February, A. D. 1891, at eight per cent. per annum, and all costs of suit, from which judgment the said Texas & Pacific Railway Company has taken an appeal to our court of appeals and desires to suspend the execution of said judgment during the pendency of said appeal:

Now, therefore, we, The Texas & Pacific Railway Company, as principal, and —— —— and —— ——, as sureties, acknowledge ourselves bound to pay to the Rosedale Street Railway Company the sum of fifteen hundred dollars, conditioned that the said Texas & Pacific Railway Company shall prosecute its appeal with effect and in case the judgment of the appellate (court of appeals) court shall be against it that it shall perform the judgment, sentence, or decree of said court and pay all such damages as said court may award against it, and further conditioned that the said Texas & Pacific Railway Company shall prosecute its appeal with effect and shall pay all costs which have accrued in the court below (the county court) or which may accrue in the appellate (court of appeals) court in said cause.

76 Witness our hands this the 26th day of February, 1891.

TEXAS & PACIFIC RAILWAY COMPANY,
By FINCH & THOMPSON, *Attorneys.*
A. B. SMITH.
E. W. TAYLOR.

Approved this 4th day of March, 1891.

JNO. P. KING,
Clerk Co. Court, Tarrant County, Texas.

Filed March 4th, 1891.

JNO. P. KING, *Co. Clk.*

Assignment of Errors.

Filed Sept. 2, 1891.

In the County Court, Tarrant County, Texas.

ROSEDALE STREET R'Y CO. *vs.* JNO. C. BROWN, Receiver, *et al.* } No. 2730.

Now comes the defendant The Texas & Pacific Railway Company and makes and files the following assignments of error:

1st assignment. The verdict is contrary to law and not supported by the evidence, in that the latter showed conclusively that neither this defendant nor those in charge of the train were guilty of any negligence at the time and place alleged, either in the matter
77 of speed, signals, or the location of the cars on the switch.

2nd assignments. The verdict is contrary to the law and the evidence, because the latter established conclusively that the driver of the street car used no care or caution at the time and place of the accident in question, and this by his own admissions, but was guilty of the grossest negligence in not using his senses by way of precaution before driving on the railway track at a crossing he knew to be dangerous.

3rd assignment. The court erred in overruling defendant's general demurrer and in failing to charge, on defendant's special defense, that plaintiff should have applied to the United States court which appointed the receiver for an adjustment of its claim, because it appears *from* the decree of the circuit court of the United States of the 5th circuit and eastern district of Louisiana and the northern district of Texas discharging the receiver and restoring the property in his custody to the defendant is a valid judgment of said court and it is the measure of defendant's liability for the contracts and torts of said receiver, and defendant is not liable for damages caused by said receiver in the operation of its railway except to the extent and in the manner prescribed by said decree.

78 4th assignment. The verdict is contrary to the law and the evidence, because it appears from the latter that plaintiff's action is barred by the statute of limitations of one and two years.

5th assignment. The verdict is contrary to the law and the evidence, because the jury evidently applied the law of comparative negligence, which is not tho rule in this State.

6th assignment. The court erred in failing and refusing to give defendant's special charge No. 1, as to the degree of care required of

the driver in approaching said crossing, because said charge embodied the law as to the care required.

7th assignment. The court erred in refusing defendant's 2nd special charge, as to the driver's duty if he knew the crossing was dangerous and his view obstructed, because said charge embodied the law applicable to the facts.

8th assignment. The court erred in refusing defendant's 3rd special charge, as to the driver's duty to use his senses, because such was the law applicable to the facts.

9th assignment. The court erred in refusing defendant's 4th special charge, as to the defendant's right to place its
79 cars on the switch where they were, because the evidence called for such a charge.

10th assignment. The court erred in refusing defendant's 5th special charge, as to the law of positive and negative testimony, because such charge was not only proper, but necessary to aid the jury under the conflicting state of the testimony.

FINCH & THOMPSON,
Att'ys for T. & P. R'y Co.

Filed September 2nd, 1891.

JNO. P. KING, *Co. Clerk.*

Statement of Costs.

County clerk's costs	$148 00
Sheriff's costs	56 10
County judge's fee	3 00
Notary fees	11 80
Witness fees	77 00
Jury fee	3 00
Total costs	$298 90

80 *Certificate of Clerk.*

THE STATE OF TEXAS, }
County of Tarrant. }

I, John P. King, clerk of the county court in and for Tarrant county, Texas, do hereby certify that the above and foregoing is a true and correct transcript of all the proceedings had upon the trial of cause No. 2730, wherein The Rosedale Street Railway Company is plaintiff and John C. Brown, receiver, *et al.* are defendants, as the same appear- of record and on file in said court.

Given under my hand and seal of said court, at office, in the city of Fort Worth, Texas, this the 13th day of January,
[L. S.] A. D. 1892.

JOHN P. KING,
Clerk County Court, Tarrant County, Texas.

81 *Certificate.*

CLERK'S OFFICE OF COURT OF APPEALS,
GALVESTON TEXAS.

I, H. A. Morse, clerk of the court of appeals of Texas, at Galveston, do hereby certify that the foregoing eighty pages contain a true and correct copy of the transcript of the record of the county court of Tarrant county as same appears in the transcript, appealed from said county court, in the case of The Texas and Pacific Railway Company *vs.* Rosedale Street Railway Company, and filed in this court on the 16th day of January, A. D. 1892, in cause No. 3348, now on file in this office.

Seal Court of Appeals of Texas.

Witness my hand and seal of said court, at Galveston, Texas, this 18th day of April, A. D. 1892.

H. A. MORSE, *Clerk.*

THE TEXAS AND PACIFIC RAILWAY COMPANY, Appellant, *vs.* THE ROSEDALE STREET RAILWAY COMPANY, Appellee. } No. 3348.

January 1st, 1892.—Submitted on briefs for both parties.

The following note made by the court of appeals is endorsed on the transcript: "The errors assigned are not well taken, and the judgment is affirmed."

82 *Judgment of Court of Appeals, March 3rd, 1892.*

THE TEXAS & PACIFIC RAILWAY COMPANY, Appellant, *vs.* THE ROSEDALE STREET RAILWAY COMPANY, Appellee. } No. 3348.

This cause came on to be heard on the transcript of the record of the court below, and, the same being inspected, because it is the opinion of this court that there was no error in the judgment, it is ordered, adjudged, and decreed that the judgment of the court below be in all things affirmed; that the appellee, The Rosedale Street Railway Company, do have and recover of and from the appellant, The Texas and Pacific Railway Company, and its sureties, A. B. Smith and E. W. Taylor, the amount adjudged below, together with all costs in this behalf incurred, and this decision be certified below for observance.

Certificate.

CLERK'S OFFICE, COURT OF APPEALS,
GALVESTON, TEXAS.

I, H. A. Morse, clerk of the court of appeals of Texas, at Galveston, do hereby certify that the foregoing 2 pages contain a true

and correct copy of all the proceedings had in the court of
83 appeals of Texas in cause number 3348, The Texas and Pacific Railway Company *vs.* The Rosedale Street Railway Company, now on file in my office, at Galveston.

Seal Court of Appeals of Texas.

Witness my hand and seal of said court, at Galveston, Texas, this the 18th day of April, A. D. 1892.

H. A. MORSE, *Clerk.*

Petition for Writ of Error.

Filed April 11th, 1892.

In the Court of Appeals of the State of Texas.

To the Honorable John P. White, presiding judge of said court:

Your petitioner, The Texas and Pacific Railway Company, respectfully shows to the court that it is a railway corporation duly organized and existing under and by virtue of the laws of the United States, to wit, "An act to incorporate the Texas Pacific Railroad Company and to aid in the construction of its road, and for other purposes," approved March 3, 1871, and acts amendatory thereof and supplemental thereto, including an act approved May 2, 1872, whereby, among other things, the name, style, and
84 title of the Texas Pacific Railroad Company was changed to "the Texas and Pacific Railway Company."

Your petitioner would further show to the court that on December 16, 1885, the Missouri Pacific Railway Company and other parties having filed suit in the United States circuit court for the eastern district of Louisiana against the Texas and Pacific Railway Company and obtained an order from that court appointing John C. Brown and Lionell A. Sheldon receivers to take possession and control of the said Texas and Pacific Railway Company and all property and effects belonging to said company and to operate said road, that said receivers, under and by virtue of said order, did take possession of said road and all the company's property and operated said road as a common carrier, under the orders of said court, from December 16, 1885, to October, 1887, when said Lionel A. Sheldon resigned, and the said John C. Brown, as receiver, operated said road until October 31, 1888, at which date the said John C. Brown, by the order of the circuit court of the United States for the fifth circuit and eastern district of Louisiana and northern district of Texas, delivered all the railroad property and effects held by him as such receiver back to the Texas and Pacific Railway Company; that said circuit court, in discharging said receiver, on October 26, 1888, upon the petition of John C. Brown, as receiver, to be discharged finally, made the following decree; which
85 petition and decree *is* as follows:

"In the United States Circuit Court.

THE MISSOURI PACIFIC RAILWAY CO. *vs.* THE TEXAS & PACIFIC RAILWAY CO.	No. 11181. Eastern District of La.
THE FIDELITY INSURANCE, TRUST & SAFE DEPOSIT CO. *vs.* THE TEXAS & PACIFIC RAILWAY CO.	Eastern District of La.
THE FIDELITY INSURANCE, TRUST & SAFE DEPOSIT CO. *vs.* THE TEXAS & PACIFIC RAILWAY CO.	Eastern District of La.
THE FIDELITY INSURANCE, TRUST & SAFE DEPOSIT CO. *vs.* THE TEXAS & PACIFIC RAILWAY CO.	Eastern District of La.
THE FIDELITY INSURANCE, TRUST & SAFE DEPOSIT CO. *vs.* THE TEXAS & PACIFIC RAILWAY CO.	Northern District of Texas, at Dallas.
GEORGE D. KRUMBHARR and SAMUEL M. FELTON, Trustees, etc., *vs.* THE TEXAS AND PACIFIC RAILWAY CO.	Northern District of Texas, at Dallas.

Petition of John C. Brown, Receiver, for Discharge.

86 To the honorable judges of the said circuit court:

Your petitioner, John C. Brown, who is the receiver of the Texas and Pacific Railway Company and its property in the above entitled and numbered causes, represents that heretofore it has been made to appear to the court that the objects and purposes of the bills in these cases have been accomplished by a settlement and agreement of the parties, and the evidence of that fact filed as part of the record; that, on its being so made to appear, the court ordered him to render his account as receiver up to the first of June, which was done, and it has been examined and approved, and since that date petitioner has kept his account as with the company. By the same order he was directed to hold the property under the orders of the court until the first of June, 1888, at which time, if said order was not vacated, the railway company might operate the road under such orders as the court might make from time to time, and under the supervision and control of the receiver. No formal delivery of the road and the property in his hands has been made to said railway company, and your petitioner now asks that he be allowed formally to deliver all property and funds in his hands as such receiver to said railway company, and that he be

allowed to account to said company according to his account filed up to the first of June, and for all receipts and expenditures by him received and made since the first of June.

87 He has carried over on the present books of the company the cash balance and all other balances, property, and assets as found in his hands by his report on the first of June aforesaid, and he is now the president of said railway company, and after his discharge will be in possession of all of said company's road, property, and funds as such aforesaid company. Wherefore he asks that he be discharged from the said receivership; that his bond as receiver be vacated and annulled on payment of all costs legally taxed, and he *pa*ys the court to make such order as will charge the property so turned over in the hands of said railway company and its assigns with all liabilities for which he, as receiver, is or might be held personally liable.

Your petitioner further says that the sum of his compensation as receiver has been agreed on by the parties in interest and is satisfactory to him and has been settled up to the 31st day of October, 1888, at which time he asks that his discharge take effect.

JNO. C. BROWN."

Filed October 26th, 1888.

That the said court entered the following order upon said petition for discharge, to wit:

"*Order on Petition of John C. Brown, Petitioner, for Discharge.*

88 On consideration of the foregoing petition, it is now ordered, adjudged, and decreed that the prayer of the same be granted, and accordingly that John C. Brown, receiver of the property of The Texas and Pacific Railway Company in the above-entitled causes, be, and he is hereby, directed to make a delivery unto said The Texas and Pacific Railway Company of all property, funds, and assets in his hands as such receiver, and that he be directed to account to said company according to his account filed and approved up to June 1, 1888, and for all receipts and expenditures by him received and made since the first of June, 1888. Such delivery will be made as of October 31, 1888.

It is further ordered that said receiver be finally discharged on said 31st day of October, 1888, from his receivership on payment of all costs legally taxed, and that thereupon his bond be vacated and cancelled.

It is further ordered that said property shall be nevertheless delivered to and received by said Texas and Pacific Railway Company, subject to and charged with all traffic liabilities due to connecting lines and all contracts which said receiver is or might be held, made, or in any way liable, and subject also to any and all judgments which have heretofore been rendered in favor of intervenors in this case and which have not been paid, as well as to such judgments as may be hereafter rendered by the court in favor

of intervenors while it retains the causes for these determina-
89 tions or interventions now pending and undetermined or which may be filed prior to February, 1889, together with needful expenses of defending said claims, and upon the condition that such liabilities and obligations of the receiver, when so recognized and adjudged, may be enforced against said property in the hands of said company or its assigns to the same extent that they could have been enforced if said property had not been surrendered into the possession of said company and was still in the hands of the court, and with the further condition that the court may, if needful for the protection of the receiver's obligations and liabilities so recognized by this court, resume possession of said property. The bills in these causes will be retained for the purpose of investigating such liabilities and obligations and for such other purpose as may seem needful. It is ordered that all claims against the receiver as such up to said 31st day of October, 1888, be presented and prosecuted by interventions prior to February 1, 1889, and, if not so presented by that date, that the same be barred and shall not be a charge on the property of said company. It is further ordered that said receiver advertise in a daily newspaper in New Orleans and Dallas the fact of his said discharge and notice to said claimants to make claim within the time aforesaid, to wit,
90 before the first of February, 1889, and that he post a printed notice of similar purport in the station-houses of said railway.

DON A. PARDEE,
Circuit Judge.

New Orleans, October 26, 1888."

Petitioner further represents that on the 3rd day of May, 1888, a street car owned by appellee, The Rosedale Street Railway Company, at the intersection of a line of street railway owned by appellee with the tracks of the Texas and Pacific Railway Company, in the city of Fort Worth, came in collision with a train of cars operated on said Texas and Pacific railway by said John C. Brown, receiver, as aforesaid, through his agents; that the said street car so owned by appellee was wrecked and damaged by the means aforesaid, caused by the negligence of said John C. Brown, receiver, and his agents operating said train of cars; that on the 16th day of May, 1888, appellee, The Rosedale Street Railway Company, instituted suit against said John C. Brown as receiver for the sum of one thousand dollars for damages sustained by it on account of aforesaid injuries to said car; that afterwards, to wit, on the 8th day of October, 1889, appellee, by an amended petition filed in said cause, in effect dismissed its said suit as to John C. Brown, receiver as aforesaid, and instituted the same on said date against petitioner,
91 The Texas and Pacific Railway Company, for and on account of damages sustained by it by reason of the injuries to said street car caused as aforesaid; that at the time said suit of October 8, 1889, was instituted against petitioner, The Texas and Pacific Railway Company, the said Brown had been discharged as such

receiver and the property in his possession as such turned over to petitioner under and in compliance with the order of the said United States circuit court above set out; that petitioner, The Texas and Pacific Railway Company, claimed as a defense to said suit the right, privilege, and immunity from being sued in the county court of Tarrant county, Texas, where this suit was filed, on such cause of action which arose against said receiver, and claimed that under the order of the said circuit court above set forth petitioner could not be sued in the county court of Tarrant county on a cause of action that arose against said receiver while he was operating said railway, and defendant specially plead and relied upon as a defense to said suit the order of the said circuit court above set out, which provided, among other things, that all claims against the receiver as such up to said 31st day of October, 1888, should be presented and prosecuted by intervention prior to February 1, 1889, and, if not so presented by that date, that the same be barred and should not be a charge upon petitioner's property.

92 Petitioner further avers that said Rosedale Street Railway Company in said cause claimed the right to prosecute said suit under the third section of an act of Congress approved March 3, 1887, entitled "An act to amend the act of Congress approved March 3, 1875, entitled An act to determine the jurisdiction of the circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes, and to further regulate the jurisdiction of the circuit courts of the United States, and for other purposes;" that The Texas and Pacific Railway Company, petitioner, claimed that said section did not confer on plaintiff the right to sue, and that it did not deprive said United States circuit court of the right to make the order above set out, requiring all claims against the receiver as such up to said 31st day of October, 1888, to be presented and prosecuted by intervention prior to February 1, 1889, and if not so presented by that date the same should be barred and should not be a charge upon petitioner's property. Petitioner avers that the decision of the county court of Tarrant county, Texas, made on the trial of said cause on the 13th day of February, 1891, was against the said right, privilege, and immunity so specially set up and claimed by petitioner, The Texas and Pacific Railway Company, by virtue of the order, judgment, and decree of the said circuit court of the United States above set out, and by virtue of the said act of Congress above

93 referred to, and judgment was then and there rendered in favor of the said Rosedale Street Railway Company and against petitioner, The Texas and Pacific Railway Company, for the sum of $350.87 and costs; from which judgment the said The Texas and Pacific Railway Company appealed to the court of appeals of the State of Texas, and the said court of appeals of the State of Texas on the 3rd day of March, 1892, affirmed the aforesaid judgment of the county court of Tarrant county and rendered a final judgment against said right, privilege, and immunity specially set up and claimed by petitioner; that said court of appeals of the State of Texas is the highest court in the State of Texas in which

a decision in the said suit can be had. Premises considered, petitioner, The Texas and Pacific Railway Company, prays for a writ of error to remove this cause to the Supreme Court of the United States, to be there re-examined by said court and said judgment reversed. It further prays for a writ of supersedeas, to the end that execution of said judgment may be suspended pending the hearing of said writ of error, and that the amount of bond therefore be fixed, and it prays that citation be issued to the said Rosedale Street Railway Company or its attorneys to appear before the Supreme Court of the United States in accordance with the law and rules of the court in such cases made and provided.

FINCH & THOMPSON,
Attorneys for the Texas & Pacific Railway Co.

94 Allowed and bond fixed at $800.00 this 2nd day of April, 1892.

JOHN P. WHITE,
Presiding Judge, Court of Appeals of Texas.

Writ of Error.

Filed April 11th, 1892.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the court of appeals of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of the State of Texas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Texas and Pacific Railway Company, as appellee, —, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of the-r being repugnant to the Constitution, treaties, or laws of the United States, and
95 the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or a statute of or commission held under the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record

and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid be inspected and said Supreme Court may cause further to be done therein to correct that error what of right, according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, on the 11th day of April, in the year of
96 our Lord one thousand eight hundred and ninety-two.

C. DART,

[L. S.] *Clerk U. S. Circuit Court, Eastern District of Texas.*

Allowed by—

JOHN P. WHITE,

Presiding Judge of the Court of Appeals of Texas.

GALVESTON, TEXAS, *April 11th*, 1892.

Plaintiff in error has this day lodged in my office a copy of the within writ of error for The Rosedale Street Railway Company, defendant in error.

H. A. MORSE,

Clerk Court of Appeals of Texas.

97 *Supersedeas Bond.*

Filed April 11th, 1892.

Know all men by these presents that The Texas and Pacific Railway Company, as principal, and W. G. Turner and H. C. Edrington, as sureties, are held and firmly bound unto the Rosedale Street Railway Company in the full and just sum of one thousand dollars, to be paid to the said Rosedale Street Railway Company, its certain attorneys, successors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 4th day of April, 1892.

Whereas lately, at a regular term of the court of appeals of the State of Texas, in a suit pending in said court between The Texas and Pacific Railway Company, as appellant, and The Rosedale Street Railway Company, as appellee, which cause was pending in said court on appeal from the county court of Tarrant county, Texas, judgment was rendered against said The Texas and Pacific Railway Company, and the said The Texas and Pacific Railway Company having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Rosedale
98 Street Railway Company and its attorneys, Messrs. Hunter, Stewart & Dunklin, citing and admonishing the said Rose-

dale Street Railway Company to be and appear at the Supreme Court of the United States, at Washington, thirty days from the 4th day of April, 1892:

Now, the condition of the said obligation is such that if the said The Texas and Pacific Railway Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

THE TEXAS AND PACIFIC
RAILWAY COMPANY,
By FINCH & THOMPSON, *Att'ys.*
W. G. TURNER.
H. C. EDRINGTON.

Approved by—
JOHN P. WHITE,
Presiding Judge, Court of Appeals of Texas.

THE STATE OF TEXAS, }
County of Tarrant. }

I, John P. King, clerk of the county court in and for said county of Tarrant, do hereby certify that W. G. Turner and H. C. Edrington, whose names appear signed to the annexed bond, are
99 in my opinion good and ample security for the amounts therein specified; that said W. G. Turner and H. C. Edrington have property in said county subject to execution of a larger amount, and that if said bond was offered to me for approval that the same would be accepted and approved.

To certify which I hereunto set my hand and impress of my official seale, at office, in the city of Fort Worth, Texas, on this the 4th day of April, 1892.

[L. S.] JOHN P. KING,
Clerk of the County Court, Tarrant County, Texas.

Assignment of Error.

Filed April 11th, 1892.

In the Supreme Court of the United States.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error, }
vs.
ROSEDALE STREET RAILWAY COMPANY, Defendant in Error. }

Now comes The Texas and Pacific Railway Company, plaintiff in error, by its attorneys, and says that in the record and proceedings in the above-entitled cause there is manifest error, in this, to wit:

100 I.

The court erred in refusing to give due effect to and in holding invalid the order and decree of the circuit court of the United States for the fifth circuit and eastern district of Louisiana and northern district of Texas in the suits of The Missouri Pacific Railway Company *vs.* The Texas and Pacific Railway Company, The Fidelity Insurance, Trust and Safe Deposit Company *vs.* The Texas and Pacific Railway Company, The Fidelity Insurance, Trust and Safe Deposit Company *vs.* The Texas and Pacific Railway Company, The Fidelity Insurance, Trust and Safe Deposit Company *vs.* The Texas and Pacific Railway Company, The Fidelity Insurance, Trust and Safe Deposit Company *vs.* The Texas and Pacific Railway Company, and George D. Krumbharr and Samuel M. Felton, trustees, etc., *vs.* The Texas and Pacific Railway Company, made on the 26th day of October, 1888, discharging John C. Brown, receiver, appointed and acting in said causes, and directing him to make delivery unto the said Texas and Pacific Railway Company of all property, funds, and assets in his hands as such receiver, and requiring, *inter alia*, that all claims against said receiver up to the 31st day of October, 1888, be presented and prosecuted by intervention in said causes prior to February 1, 1889, and if not so presented by that date that the same should be barred and should not be a charge on
101 the property of said Texas and Pacific Railway Company, and in deciding against the right, title, and immunity specially set up by plaintiff in error, that by virtue of said order it could not be held responsible in this suit for the acts of the said receiver, for the reason that defendant in error's claim and cause of action was barred and decreed not to be a charge on the property of the Texas and Pacific Railway Company.

II.

The court erred in holding that the defendant in error had the right to prosecute its suit against the plaintiff in error under the third section of an act of Congress approved March 3rd, 1887, entitled "An act to amend the act of Congress approved March 3, 1875, entitled An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes, and to regulate the jurisdiction of the circuit courts of the United States, and for other purposes," and in holding that said act deprived the Federal court of the right to make the order providing that all claims against said John C. Brown, receiver, should be presented and prosecuted by intervention prior to February 1, 1889, which said decision was against the right, title, privilege, and immunity specially set up and claimed by the plaintiff in error herein, to the effect that by virtue of said act it could not be sued in the county court
102 of Tarrant county for the wrongful acts of said John C. Brown, receiver; and defendant in error having failed to comply with the terms of said order by the first day of February,

1889, the said cause of action was barred and was not a charge on the property of plaintiff in error.

Wherefore The Texas and Pacific Railway Company, plaintiff in error, prays that said judgment or decree be reversed; and it will ever pray.

HENRY FINCH,
GEORGE THOMPSON,
Attorneys for Plaintiff in Error.

103 *Certificate.*

Court of Appeals of the State of Texas.

I, H. A. Morse, clerk of the court of appeals of the State of Texas, holding its sessions in Galveston, do hereby certify the foregoing to be a true and correct copy of the record and of all proceedings in case No. 3348, entitled The Texas and Pacific Railway Company *vs.* The Rosedale Street Railway Company, as the same now appears on file and of record in my office.

Seal Court of Appeals of Texas.

To certify which witness my hand and the seal of said court, at Galveston, this the 18th day of April, 1892.

H. A. MORSE,
Clerk Court of Appeals.

104 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the court of appeals of the State of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of the State of Texas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Texas and Pacific Railway Company, as appellant, and The Rosedale Street Railway Company, as appellee, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or a statute of or commission held under the United States and the decision was against the right, title, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The Texas and Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath
105 been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you,

if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid be inspected and said Supreme Court may cause further to be done therein to correct that error what of right, according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, on the 11th day of April, in the year of our Lord one thousand eight hundred and ninety-two.

[Seal United States Circuit Court, Eastern District of Texas.]

C. DART,
Clerk U. S. Circuit Court, Eastern District of Texas.

Allowed by—
JOHN P. WHITE,
Presiding Judge of the Court of Appeals of Texas.

106 [Endorsed:] No. 3348—1st. Texas & Pacific R. Co. *vs.* Rosedale Street R. Co. Writ of error.

GALVESTON, TEXAS, *April* 11, 1892.

Plaintiff in error has this day lodged in my office a copy of the within writ of error for The Rosedale Street Railway Company, defendant in error.

H. A. MORSE,
Clerk Court of Appeals of Texas.

Filed in court of appeals, at Galveston, April 11, 1892.

H. A. MORSE,
Clerk Court of Appeals of Texas.

107 THE UNITED STATES OF AMERICA, *ss:*

To the Rosedale Street Railway Company, a corporation having its principal office in Tarrant county, Texas, or Messrs. Hunter, Stewart & Dunklin, its attorneys, who reside in Tarrant county, State of Texas, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to writ of error filed in the clerk's office of the court of appeals of Texas, in a suit wherein The Texas and Pacific Railway Company is plaintiff in error and you, the said Rosedale Street Railway Company, is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John P. White, presiding judge of the court of appeals of Texas, this 8th day of April, in the year of our Lord one thousand eight hundred and ninety-two.

JOHN P. WHITE,
Presiding Judge of the Court of Appeals of Texas.

We accept service of this citation.

HUNTER, STEWART & DUNKLIN,
Att'ys for Rosedale St. R'y Co.

April 14th, 1892.

108 [Endorsed:] No. 3348—1st. Texas & Pacific R'w'y Co. *vs.* Rosedale Street R'w'y Co. Citation in error. Filed in court of appeals, at Galveston, April 16, 1892. H. A. Morse, clerk.

109 In the Supreme Court of the United States.

THE TEXAS AND PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
ROSEDALE STREET RAILWAY COMPANY, Defendant in Error.

Now comes The Texas and Pacific Railway Company, plaintiff in error, by its attorneys, and says that in the record and proceedings in the above-entitled cause there is manifest error, in this, to wit:

I.

The court erred in refusing to give due effect to and in holding invalid the order and decree of the circuit court of the United States for the fifth circuit and eastern district of Louisiana and northern district of Texas in the suits of The Missouri Pacific Railway Company *vs.* The Texas and Pacific Railway Company, The Fidelity Insurance, Trust and Safe Deposit Company *vs.* The Texas and Pacific Railway Company, The Fidelity Insurance, Trust and Safe Deposit Company *vs.* The Texas and Pacific Railway Company, The Fidelity Insurance, Trust and Safe Deposit Company *vs.* The Texas and Pacific Railway Company, The Fidelity Insurance, Trust and Safe Deposit Company *vs.* The Texas and Pacific Railway Company, and George D. Krumbharr and Samuel M. Felton, trustees, etc., *vs.* The Texas and Pacific Railway Company, made on the 26th
110 day of October, 1888, discharging John C. Brown, receiver, appointed and acting in said causes, and directing him to make delivery unto the said Texas and Pacific Railway Company of all property, funds, and assets in his hands as such receiver, and requiring, *inter alia*, that all claims against said receiver up to the 31st day of October, 1888, be presented and prosecuted by intervention in said causes prior to February 1, 1889, and if not so presented by that date that the same should be barred and should not be a charge on the property of said Texas and Pacific Railway Company, and in deciding against the right, title, and immunity specially set up by plaintiff in error, that by virtue of said order it could not be held responsible in this suit for the acts of the said receiver, for the

reason that defendant in error's claim and cause of action was barred and decreed not to be a charge on the property of the Texas and Pacific Railway Company.

II.

The court erred in holding that the defendant in error had the right to prosecute its suit against the plaintiff in error under the third section of an act of Congress approved March 3, 1887, entitled "An act to amend the act of Congress approved March 3, 1875, entitled An act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes, and to regulate the jurisdiction of the circuit courts of the United States, and for other purposes," and in holding that said act deprived the Federal court of the right to make the order providing that all claims against said John C.
111 Brown, receiver, should be presented and prosecuted by intervention prior to February 1, 1889, which said decision was against the right, title, privilege, and immunity specially set up and claimed by the plaintiff in error herein, to the effect that by virtue of said act it could not be sued in the county court of Tarrant county for the wrongful acts of said John C. Brown, receiver; and defendant in error having failed to comply with the terms of said order by the first day of February, 1889, the said cause of action was barred and was not a charge on the property of plaintiff in error.

Wherefore The Texas and Pacific Railway Company, plaintiff in error, prays that said judgment or decree be reversed; and it will ever pray.

HENRY FINCH,
GEORGE THOMPSON,
Attorneys for Plaintiff in Error.

112 [Endorsed:] No. 3348—1. The Texas and Pacific R'y Co., plaintiff in error, *vs.* Rosedale Street R'y Co., d'f't in error. Assignments of error. Filed in court of appeals, at Galveston, April 11, 1892. H. A. Morse, clerk.

Endorsed on cover: Case No. 15,030. Texas court of appeals. Term No., 114. The Texas and Pacific Railway Company, plaintiff in error, *vs.* The Rosedale Street Railway Company. Filed April 27, 1892.

TRANSCRIPT OF RECORD.

Supreme Court of the United States.

October Term, 1895.

No. 948.

WILLIAM H. STRICKLAND, MASTER AND CLAIMANT OF STEAMSHIP "CLANDEBOYE,"
APPELLANT,

versus

LEO LOMM, MASTER, &c., APPELLEE.

ON PETITION OF THE APPELLEE FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.